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No.

IN THE

Supreme Court of the United States

October Term, 1997

PROFESSIONAL PILOTS FEDERATION,
WILLIAM T. REINERS, III, PHILIP T. SHAW,

Petitioners

v

FEDERAL AVIATION ADMINISTRATION,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The court below held that a Federal Aviation Administration regulation that requires scheduled airline pilots to cease work at age 60 was a reasonable exercise of agency discretion. In so ruling, the court held that the FAA was not bound by the requirement of the Age Discrimination in Employment Act ("ADEA") that any age-based prohibition on employment meet the requirements for a bona fide occupational qualification ("BFOQ"). The Equal Employment Opportunity Commission, the agency that administers the ADEA, has consistently taken the position that the Age 60 Rule is not a BFOQ. The questions presented are:

(1) Whether the Federal Aviation Administration's general power to regulate air commerce and safety implies the power to relieve airline employers of their specific statutory obligation to avoid age-based discharge under the ADEA.

(2) Whether a federal agency regulation that contravenes the policy of another federal agency acting within the scope of its governing statute should be subject to a more exacting standard of review than a regulation that does not infringe on conflicting governmental policies.

RULE 29.6 LISTING

The sole corporate petitioner is the Professional Pilots Federation. PPF is a non-profit membership corporation and has no parent companies, subsidiaries, or affiliates.

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v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Professional Pilots Federation, William T. Reiners, III, and Philip T. Shaw respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra.*, a-1-39) is reported at 118 F.3d 758. The underlying administrative decision of the Federal Aviation Administration, *Disposition of comments and notice of agency decisions concerning the Age 60 Rule*, (App. B., *infra*, a-40-76) is

published at 60 Fed. Reg. 65,977.

JURISDICTION

The court of appeals entered its judgment on July 15, 1997. A petition for rehearing was timely filed and was denied on November 5, 1997. (App. C, *infra*, at a-77). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves the construction and interrelationship of sections of the former Federal Aviation Act, 49 U.S.C. §§ 44701, 44702, the Age Discrimination in Employment Act, 29 U.S.C. §623, the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §706, the "Age 60 Rule," promulgated by the Federal Aviation Administration, 14 C.F.R. §121.383(c), and regulations of the Equal Employment Opportunity Commission that prescribe the requirements for bona fide occupational qualifications, 29 C.F.R. §1625.6. These statutes and regulations are set forth in the appendix. (App. D, *infra* at a-78-83).

STATEMENT OF THE CASE

Introduction

The matter here presents a conflict arising because one federal agency, acting under its governing statute, continues to enforce a regulation that requires conduct that violates the explicit language of a later enacted federal statute and the regulations of the federal agency charged with enforcement of the later statute. Consequently, this case involves the standard of review that is appropriate to an agency regulation that

conflicts with a statute and regulations administered by another agency.

The "Age 60 Rule," 14 C.F.R. §121.383(c), prohibits an employer from employing a pilot to operate commercial aircraft under Part 121 of the Federal Aviation Regulations, 14 C.F.R. Part 121, once he has reached his sixtieth birthday. The FAA has never granted an exemption from the rule, although it routinely grants exemptions to younger pilots with disqualifying medical conditions. The Age Discrimination in Employment Act ("ADEA"), prohibits age-based discrimination, including mandatory retirement, unless the employer can demonstrate that an arbitrary age limit constitutes a "bona fide occupational qualification ["BFOQ"] reasonably necessary to the normal operation of the particular business." 29 U.S.C. §623(f). Since 1981 it has been the stated position of the Equal Employment Opportunity Commission, the agency that administers the ADEA, that the Age 60 Rule is not a per se BFOQ because pilot medical fitness and proficiency can be appraised adequately without an inflexible age prohibition.

In December, 1995, after years of study and public hearings on whether the Age 60 Rule should be changed or eliminated, the FAA announced that the rule would not be changed and would be extended to certain commuter operations that previously had not been subject to it. The District of Columbia Court of Appeals affirmed the FAA's decision over a vigorous dissent. Petitioners seek the aid of this Court to clarify longstanding ambiguities in an important area of federal law, establish an appropriate standard for review of federal agency decisions that conflict with statutes and regulations administered by other agencies, and resolve conflicts between the decision below and decisions of this Court and other courts of appeals.

The History of the Age 60 Rule

In 1958 Congress passed the Federal Aviation Act, Pub. L. 85-726, 72 Stat. 737, transferring the safety functions of the Civil Aeronautics Board to the newly created Federal Aviation Administration. Under the act the FAA administrator was given broad but vague authority to promulgate "regulations in the interest of safety for the maximum hours or periods of service of airmen," 49 U.S.C. §44701(a)(4), to prescribe "regulations...for other practices, methods, and procedure the Administrator finds necessary for safety in air commerce," 49 U.S.C. §44701(a)(5), to regulate "in a way that best tends to reduce or eliminate the possibility or recurrence of accidents," 49 U.S.C. §44701(c), and to consider "the duty of an air carrier to provide service with the highest possible degree of safety," 49 U.S.C. §44702(b)(1)(A).[1]

Pursuant to these powers in June, 1959, the FAA issued a notice of proposed rulemaking to establish an age limit for pilots engaged in operations under Part 121 of the Federal Aviation Regulations, which governs major scheduled passenger and cargo service but not to corporate or charter flights, irrespective of the number of passengers carried. 24 Fed. Reg. 5,248 (1959). The imposition the rule was justified on account of a perceived risk of "sudden incapacity" from cardiovascular disease, decline in physical stamina, and a purported decline in older pilots' ability "to perform effectively in a complex and stressful environment." *Id* at

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[1]The Federal Aviation Act of 1958 was reenacted into positive law in codified form in July, 1994. The reenactment was not intended to make any substantive changes in the governing law. See Pub. L. 103-272, 108 Stat. 745 (1994).

5,249.[2] On December 5, 1959, the rule was promulgated without holding any public hearing. 24 Fed. Reg. 9,767 (1959).

The Age 60 Rule has remained essentially unchanged since its establishment. It provides that:

> No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.

14 C.F.R. §121.383(c).

The safety justification for the rule is dubious. The rule's initial implementation was strongly colored by labor/management politics. *See* Comment, *Mandatory Retirement of Airline Pilots: An Analysis of the FAA's Age 60 Retirement Rule*, 33 Hastings L.J. 241, 243-46 (1981); Karl M. Ruppenthal, *Compulsory Retirement of Air Line Pilots*, 14 Indus. & Labor Rel. Rev. 528, 539-45 (1961). *See also* R. 618-27[3] (ex parte letters between the president of American

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[2]The FAA continued to cite the risk of incapacitation as a justification for the Age 60 Rule in the decision here under appeal. App. B at a-54. The risk in Part 121 operations is extremely remote. A medical expert testified at the FAA hearings that there have been no passenger fatalities due to pilot incapacitation in Part 121 operations in the past 30 years. R. 498 (testimony of Dr. Robin Barr).

[3]Refers to the record in the Joint Appendix on Appeal in the court below.

Airlines and the FAA administrator advocating implementation of the rule after arbitration panels held that there was no safety justification for age 60 retirement.) Because of its political overtones, the rule's merit remained in sharp dispute. The Seventh Circuit Court of Appeals observed that "Since its enactment, the age sixty rule has been the subject of continuous controversy and intermittent reconsideration by the FAA." *Aman v. FAA,* 856 F.2d 946, 948 (7th Cir. 1988). Between 1962 and 1984 the rule was subjected to more than half a dozen studies, reports, and proposed rulemakings, without undergoing any change. *Id.*

The rule was also exposed to congressional scrutiny. In 1979 the House Select Committee on Aging held hearings on the rule, resulting in a law that directed the National Institute of Health to study the rule to determine if it was still scientifically justified. *See,* App. A at a-4; House Select Comm. On Aging, *Age Discrimination Against Airline Pilots, 96th Cong.*, 1st Sess., (1979).; Pub. L. No. 96-171, 93 Stat. 1285 (1979). The NIH Report concluded that there was "no convincing medical evidence to support age 60, or any other specific age, for mandatory pilot retirement," [emphasis original], but recommended that the rule be retained so that the FAA could "engage in a systematic program to collect the medical and performance data necessary to consider relaxation of the current Age 60 Rule." Nat'l Inst. Of Health, Dep't of Health & Human Svcs., *Report on the National Institute of Aging Panel on the Experienced Pilots Study* (1981), 1-2 (R. 149-50). *See also* App. A at a-4.

In 1990, in response to criticism of the Age 60 Rule expressed by the Seventh Circuit in the *Aman* case and in further hearings before the House Select Committee on

Aging,[4] the FAA commissioned the "Hilton Study," a "2-year study to consolidate accident data and correlate it with flying experience and age of pilots." App. B at a-46. The study, which was conducted by an independent research organization under the supervision of the FAA's Civil Aeromedical Institute, concluded that there was "no support for the hypothesis that pilots of scheduled carriers had increased accident rates as they neared the age of 60," but that, on the contrary, there was a "slight downward trend" in accident rates as pilots neared that age. App. A at a-4-5; *Age 60 Project*, Hilton Systems Technical Report 8025-3C(R2) at 6-2.

In light of the Hilton Study's conclusion, the FAA published a notice in the Federal Register announcing a public meeting to discuss the rule, inviting comment as to whether the rule should be changed, and, if so, in what respects. 58 Fed. Reg. 21,336 (1993). A public meeting was held in September, 1993, and approximately 1,200 written comments were received. App. B at a-46.

In the meantime, following a series of accidents involving commuter airlines, the FAA initiated a separate proposed rulemaking to include certain commuter operations that had been conducted under Part 135 of the Federal Aviation Regulations under the more stringent requirements of Part 121[5]. App. A at a-5; 60 Fed. Reg. 16,230 (1995). In

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[4]*See Age Discrimination and the FAA Age 60 Rule: Hearings Before the House Select Comm. On Aging*, 99th Cong. (1985).

[5]Ironically, none of the accidents involved older pilots. According to the National Transportation Safety Board reports the captains of the three ill-fated aircraft were aged 42, 35, and 29. The first officers were 25, 29, and 25. R. 557. Indeed, at least two of the

the notice, the FAA announced that the Age 60 Rule would apply to the commuter operations whether it was revised or not. App. B at a-47. More than 2,000 additional written comments that discussed the Age 60 Rule were received in response to the proposed rulemaking on the commuter operations rules. *Id.*

In December, 1995, the FAA issued a "Disposition of comments and notice of agency decisions," announcing that the Age 60 Rule would not be changed and that it would be extended to the commuter operations that were to be made subject to Part 121. See App. B, a-40 *et seq.*; 60 Fed. Reg. 65,977 (1995). Following a lengthy discussion of the history of the rule and the medical and statistical studies, the FAA dismissed concerns about violations of the ADEA on the grounds that "safety...is paramount," App. B at a-72, observing that "concerns regarding aging pilots and underlying the original rule have not been shown to be invalid or misplaced." App. B at a-53.

The Age 60 Rule and the ADEA

Because the ADEA had not been enacted when the Age 60 Rule was promulgated, the initial challenges to the rule did not address age discrimination issues. The rule was first challenged as an abuse of the FAA's discretion under the Federal Aviation Act and upheld as a reasonable exercise of discretion. *Air Line Pilots Ass'n Int'l v. Quesada,* 276 F.2d 892 (1960), *cert. denied,* 366 U.S. 962 (1961). *O'Donnell v. Shaffer*, 491 F.2d 59 (D.C. Cir. 1974).

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three accidents involved improper procedure by the flight crews that were the apparent result of inexperience and lack of proper training. See 60 Fed. Reg. 16,232 (1995).

With the enactment of the ADEA in 1967, it became illegal for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. §623(a)(1). An exception was allowed in circumstances where "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. §623(f)(1).

Initially the ADEA was administered by the Department of Labor which issued interpretations that cited the Age 60 Rule as an example of a BFOQ. Courts accordingly deferred to the agency interpretation. *See, e.g., Starr v. FAA*, 589 F.2d 307, 313 (7th Cir. 1978). Then, in 1981, the administration of the ADEA was transferred to the newly created Equal Employment Opportunity Commission. The EEOC issued new interpretations concerning the BFOQ exception, deleting the Age 60 Rule as an example of a BFOQ, among others, "to avoid the appearance that those examples had received the imprimatur of the Commission," and singling out the "controversial" Age 60 Rule as "Most notable in this regard." 46 Fed. Reg. 47,725 (1981).

The EEOC's opposition to the Age 60 Rule has remained outspoken and vigorous. In the administrative proceedings below the EEOC submitted letters to the FAA in both the Age 60 Rule docket and the Commuter Rule docket asserting the Commission's position that "The EEOC does not believe that a chronological age limitation for commercial pilots is a BFOQ because pilot skills and health can be assessed accurately on an individual basis regardless of age." R. 379. *See also,* R. 555-59. The EEOC cited five previous occasions in which it officially objected to the rule. R. 556, n. 5.

In addition, the EEOC aggressively, and often successfully, pursued litigation against employers who attempted to use the Age 60 Rule to justify mandatory retirement of pilots who were not operating under Part 121 or flight engineers who were no subject to the rule.[6] *See, e.g., EEOC v. Boeing Corp.*, 843 F.2d 1213 (9th Cir. 1988), *cert. denied*, 488 U.S. 889 (1988); *EEOC v. Pan American World Airways, Inc.*, 52 Fair Empl. Prac. Cas. (BNA) 940 (N.D.Cal. 1988); *EEOC v. Northwest Airlines, Inc.*, 49 Fair Empl. Prac. Cas. (BNA) 1433 (W.D. Wash. 1987). Many private litigants also successfully challenged employer retirement policies on the grounds that the Age 60 Rule did not qualify as a BFOQ for pilots or flight engineers who were not directly subject to the rule. *E.g., Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); ; *Tuohy v. Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982).[7]

Prior to the present proceedings, and a related challenge in the Sixth Circuit, *Coupé v. Federal Express Corp.*, 121 F.3d 1022 (6th Cir. 1997), *petition for cert.*

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[6]All aircraft flying under Part 121 are required to have at least a pilot and a copilot. 14 C.F.R. §121.385(c)(1). In addition, many types of large commercial aircraft require a second officer, or flight engineer who is also a pilot. The flight engineer's duties include management of cabin pressurization, engine and fuel management, and control of the electrical and hydraulic systems.

[7] The courts are not unanimous on this point. Other courts have upheld jury determinations that age was an appropriate BFOQ for flight engineers or corporate pilots because of the particular circumstances of their operations. *E.g., EEOC v. American Airlines, Inc.*, 48 F.3d 164 (5th Cir. 1995); *Williams v. Hughes Helicopters, Inc.*, 806 F.2d 1387 (9th Cir. 1986); *Iervolino v. Delta Air Lines, Inc.*, 796 F.2d 1408 (11th Cir. 1986).

filed, No. 97-1012 (Dec. 18, 1997), neither the EEOC nor private litigants directly asserted that the Age 60 Rule was in violation of the ADEA for pilots operating under Part 121. *See, e.g., Aman v. FAA*, 856 F.2d 946, 956, n. 13 (7th Cir. 1988); *Baker v. FAA*, 917 F.2d 318 (7th Cir.), *cert. denied*, 499 U.S. 936 (1991) (reviewing the FAA's refusal to grant exemptions to the rule while declining to review asserted ADEA conflict.).

The Present Proceedings

Following the FAA's announcement that the Age 60 Rule would be maintained and extended, the three petitioners here filed a petition for review of the FAA's order in the D.C. Circuit, asserting jurisdiction under 49 U.S.C. §46110(a).[8] The appeal had two bases: (1) that the Age 60 Rule was in conflict with the ADEA's prohibition on employment discrimination, and (2) that the FAA's decision constituted an abuse of discretion under the Administrative Procedure Act, 5 U.S.C. § 701, *et. seq.*, because, among other reasons, the FAA failed to consider reasonable alternatives to age discrimination and failed to explain adequately why older pilots were treated differently from other pilot groups who demonstrated an equal or greater safety risk. App. A at a-6-7.

The panel rejected petitioners ADEA challenge on the grounds that the ADEA is directed solely to employers and

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[8]Two petitions for review were filed and then consolidated. The original petition sought review of the FAA's December 20, 1995 order. In addition, petitioner Reiners had filed a petition for exemption from the rule and the Professional Pilots Federation had filed a petition to repeal the rule. These petitions, formally denied on December 28, 1995, were the subject of the second petition for review.

thus "places no substantive limitation upon the [FAA's] authority to act as a regulator of the airline industry," so that "The general prohibition of the ADEA, addressed as it is to employers, should not be read by mere implication to override the specific grants of authority to the FAA in 49 U.S.C. §44701." App. A at a-8. The panel therefore concluded that it need not address the issue of whether the Age 60 Rule qualified as a BFOQ. *Id.*at a-9. The dissent joined in this portion of the opinion. *Id.* at a-26.

The panel majority also upheld the FAA on the APA challenge. On the assumption that it was required to afford the FAA's determination "considerable deference," App. A at a-10, the panel determined that the FAA had given "adequate consideration" to petitioners' arguments, *Id.* at a-13, that the agency's rejection of their objections was "not unreasonable," *Id.* at a-14 or had been "adequately explained," *Id.* at 19, and that, therefore, "the FAA was not arbitrary and capricious, in violation of the APA." *Id.* at A-24.

Judge Wald, in sharp dissent, argued that "the FAA's justification for the rule simply does not pass muster under the APA," App. A at a-26. After reviewing inconsistencies in the FAA's application in the rule, the agency's review of the medical and statistical data, its policy of granting waivers to younger pilots with a history of cardiovascular or neurological disorders while denying them to older pilots, and noting that in European and Asian countries the age 60 limitation has been widely abandoned, she concluded that "the FAA has failed to provide a reasoned explanation for its decision to retain the Age 60 Rule." *Id.* at a-39. She also dissented from the court's denial of the petition for rehearing. App. C at a-77, and filed a detailed dissent to the court's denial of petitioners' suggestion for rehearing en banc.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW IS IN CONFLICT WITH THE ADEA, EEOC REGULATIONS, AND THIS COURT'S DECISION IN *WESTERN AIR LINES V. CRISWELL.*

The ADEA prescribes that it is unlawful for an employer "to discharge any individual...because of such individual's age." 29 U.S.C. §623(a)(1). Age-based discharge may be permitted, however, "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business...." 29 U.S.C. §623(f)(1).

The court below concluded that the Age 60 Rule, a regulation not required by the FAA's governing statute, did not violate the ADEA because the FAA was not bound by a statute that was addressed to employers, and because the "general prohibition" of the ADEA "should not be read by mere implication to override the specific grants of authority to the FAA in 49 U.S.C. §44701." App. A at a-8. Finding the Federal Aviation Act supreme, the D.C. Circuit saw no need to determine whether the Age 60 Rule qualified as a BFOQ under the ADEA. In so holding, the court of appeals departed from established principles of statutory interpretation and left airline employers in a position where they are required to violate the express command of the ADEA without having to demonstrate that they come within the act's exception for a BFOQ.

The underlying premise of the court's opinion is that

the ADEA's prohibition is "general" while the FAA's grant of authority is "specific." This assumption is belied by the plain language of the statutes themselves. The ADEA is as specific in its prohibition of age based discharge, 29 U.S.C. §623(a)(1), as it is about limiting the permissible exceptions to specific circumstances that include proving that age is a BFOQ, 29 U.S.C. §623(f)(1). The Federal Aviation Act, by contrast, makes no reference to any power to prescribe age limits as part of its regulatory powers and only the most general reference to a power to regulate the "periods of service" of airmen and "practices...necessary for safety in air commerce." 49 U.S.C. §44701(a)(4), (5).[9]

By granting primacy to the vague generalities of the Federal Aviation Act, the court below violated settled principles of statutory interpretation. *See, e.g.; Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1988) ("We should be reluctant...to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute."); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1993) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one....").

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[9]The Federal Aviation Act gives the administrator authority to regulate "maximum hours or periods of service of airmen," referring to the FAA's authority to regulate the hours and frequency with which airmen could be required to be on duty. 49 U.S.C. §44701(a)(4). *See, e.g., Flight Crewmember Duty Period Limitations, Flight Time Limitations and Rest Requirements*, 60 Fed. Reg. 65,951-52 (1995). The court below quoted the statute to refer to the "*period* of service for airmen," App. A at a-8 (emphasis added), apparently assuming that this "period" encompassed age limitations. This was both a misquotation and a misreading of the statute.

Implicit in the analysis of the FAA and the D.C. Circuit is the assumption that safety is "paramount," App. B at a-74, and that therefore the objectives of the Federal Aviation Act take precedence over those of the ADEA. This analysis ignores the fact that the ADEA itself, the EEOC's regulations interpreting the ADEA, and a leading decision of this Court allow for public safety to be weighed as a factor in determining whether age based prohibitions qualify as a BFOQ. The ADEA allows an age cutoff to be a BFOQ if it is "reasonably necessary to the normal operation of the particular business." 29 U.S.C. §623(a)(1). EEOC regulations interpreting the statute provide that:

> (a) Whether occupational qualifications will be deemed to be "bona fide" to a specific job and "reasonably necessary to the normal operation of the particular business," will be determined on the basis of all the pertinent facts surrounding each particular situation. It is anticipated that this concept of a bona fide occupational qualification will have limited scope and application. Further, as this is an exception to the Act, it must be narrowly construed.
>
> (b) An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and...(3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. *If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged*

> *practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.*

29 C.F.R. §1625.6 (emphasis added).

The EEOC regulations were explicitly approved by this Court in *Western Air Lines v Criswell*, 472 U.S. at 412, which also confirmed that "Congress expressly decided that problems involving age discrimination in employment should be resolved on a 'case-by-case basis' by proof to a jury." *Id.* at 422. Moreover, *Criswell* established that safety considerations do not justify a departure from the statute's requirement that the employer establish a BFOQ, but rather that safety considerations were to be weighed as part of the determination of whether a specific age constituted a BFOQ for a particular job. *Id.* at 419. The Court also observed that safety considerations "do not relieve the employer from its burden of establishing a BFOQ by the preponderance of the credible evidence." *Id.* at 419, n. 29.

Although *Criswell* did not involve pilots operating under Part 121, there is no suggestion in the opinion that the Court approved of the rule as it applied to those pilots. Indeed, in *TWA v. Thurston* the Court observed that the pilots in that case were not challenging the rule as it applied to captains, but noted that the "EEOC wishes to avoid any appearance that it endorses the rule." 469 U.S. at 121, n. 17. This implies that the Court viewed the legality of the Age 60 Rule as unsettled.

Criswell, the leading case construing the BFOQ exception, involved airplane operational jobs closely

analogous to the pilot jobs covered by the Age 60 Rule. Surprisingly, it was not distinguished nor even cited in the D.C. Circuit's decision. The *Criswell* decision cannot be ignored, however, because it requires an employer to justify age-based retirement by proving that it is a BFOQ for a particular job. The decision below relieves the employer of that burden. Thus, the decision of the court below is in direct conflict with *Criswell*.

It is an established principle of statutory construction that when two statutes are in conflict a court should "give effect to each...while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (citations omitted). Where, as here, the conflict is between a regulation and a statute, the policy is even more compelling. But instead of trying to reconcile the competing policies of the differing statutes by following the analysis set forth in *Criswell*, the court below arbitrarily determined that the FAA could ignore the congressional policies expressed in the ADEA. Therefore, despite the express disapproval of the EEOC, the FAA could (1) relieve the employer of the burden of proving that there is no acceptable alternative to an age prohibition that will advance the goal of public safety, and (2) require that an age-based prohibition on employment be applied not on a case-by-case basis, but to all pilots engaged in Part 121 operations, irrespective of the equipment used, the route flown, or whether passengers are carried. The D.C. Circuit's approach repudiates the plain language of the ADEA, the EEOC regulations, and the directives of this Court in *Criswell*.

The importance of the civil rights policies underlying the ADEA was recently confirmed in this court's decision in *Oubre v. Entergy Operations, Inc.*, ___U.S.___, 1998 U.S. Lexis 646 (No. 96-1291, January 26, 1998), which held an

employee's voluntary waiver of her ADEA claim to be voidable because enforcement of the waiver "would frustrate the statute's practical operation as well as its formal command." 1998 Lexis 646 at *9. Here, the right of the airline pilot to require his employer to establish that an age-based prohibition qualifies as a BFOQ is similarly frustrated.

Although the ADEA is not directed to government agencies in their regulatory capacity, it does not follow that an agency is free to regulate in a manner that subverts congressional policy and the regulations of the agency that administers that policy. The holding of the court below constitutes serious error for three reasons: (1) It implies an exception to the ADEA that is not expressed in statute nor supported by any legislative history or subsequent case law; (2) It creates a situation in which the employer is required, by one agency, to violate the regulations of another agency; (3) It ignores this Court's determination in *Criswell* that (a) exceptions to the ADEA must be evaluated on a "case-by-case basis," and that (b) age limits justified on grounds of safety should be subject to analysis under the ADEA's exception for a bona fide occupational qualification.

II

THE COURT BELOW APPLIED AN INSUFFICIENTLY RIGOROUS STANDARD OF REVIEW TO A REGULATION THAT INFRINGED ON IMPORTANT STATUTORY POLICIES.

Even if the court of appeals were correct in its holding that FAA's regulatory power may override the civil rights policies underlying the ADEA, it does not follow that the agency's discretion to thwart the established policy of Congress and other administrative agencies is as broad as it would be if these considerations were absent. The court below reviewed the FAA's decision here affording the agency the "usual—and considerable—deference we show an agency when it adopts a rule implementing a statute it is charged with administering." App. A at a-10. The dissent, by contrast, urged that because the ADEA "manifests our country's rejection of measures that discriminate against individuals solely because of their age" it follows that the FAA cannot "ignore the ADEA altogether," and that congressional policies embodied in the ADEA impose a "duty on the FAA to try to obtain data that might allow it to do away with its current reliance on an arbitrary across-the-board age cutoff." App. A at a-38. Although the dissent purported to concur with an "arbitrary and capricious" standard of review, App. A at a-26, n.2, Judge Wald's analysis properly faulted the FAA for not giving special consideration to federal age discrimination policy in its exploration of alternatives to the Age 60 Rule.

In *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 173-74 (1962) this Court articulated the principle

that when an agency administers its statute in a manner that potentially conflicts with another agency there is the danger that "it may trench upon the other's jurisdiction, and, because of lack of expert competence, contravene the national policy" administered by the other agency. Consequently, the Court held that in such situations, absent a "compelling justification," an agency's remedy must be "precisely and narrowly drawn." Thus, where competing statutory policies are involved, an agency must be especially diligent to try to accommodate all of the policies, not just its own. "Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942).

This heightened standard of review is fully consistent with the principles of deferential administrative review enunciated in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1993) and *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under the Administrative Procedure Act, a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be...in excess of statutory jurisdiction, authority, or limitations, or short of statutory right...." 5 U.S.C. §706(2)(C). "[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. It follows that an agency is not entitled to deference when it interprets another agency's statute. *See, e.g., Department of the Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988) ("when an agency interprets a statute other than that which it has been entrusted to administer, its interpretation is not entitled to deference"); *IRS Fresno Serv. Center v. FLRA*, 706 F.2d 1019, 1023 (9th

Cir. 1983) ("While this court may give 'considerable' weight to the Authority's interpretation of the Labor-Management Chapter, no such deference is owed to the Authority's reading of an EEOC regulation or to the Authority's resolution of the conflict between the statute and the EEOC regulation.").

To the extent that the court below perceived a heightened standard of review to conflict with the *Chevron* "principle of deference to administrative interpretations," , 467 U.S. at 844, there is all the more reason for this Court to correct misguided policy. One commentator has noted:

> Where the agencies themselves conflict in their interpretations, there is no room for the doctrine of limited review. In such a case, the dispute about the agencies' interpretation must be treated as a zero-sum game to be resolved by the judicial umpire. While this may be contrary to *Gray v. Powell*[10]*-Chevron*, it accords with common sense.

Bernard Schwartz, *Administrative Law* §10.38 (3d ed. 1991).

As Judge Wald ably pointed out in her dissent, and as the Seventh Circuit predicted in the *Baker* case, *see infra* at 24-25, the Age 60 Rule can no longer be justified in light of the recently developed data that disproves the assumptions underlying the rule and the FAA's inconsistent application of the rule. For example, the FAA applies the rule to air cargo operations that do not endanger any passengers, while exempting air taxis and corporate operations that may carry substantial numbers of passengers. App. A at a-30-31. The

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[10]*Gray v. Powell*, 314 U.S. 402 (1941).

FAA refuses to grant waivers to pilots over the age of 60 in demonstrably good health while it routinely grants medical waivers to younger pilots who have a history of cardiovascular, neurological, and psychological disorders. *Id.* At 29. The FAA contends that it would be dangerous to permit pilots over the age of 60 to fly, even if carefully screened, although the medical studies that the FAA relies upon recommend that these pilots be granted waivers. *Id.* at a-36. These policies are maintained without exception even though European and Asian pilots fly past the age of 60 and routinely fly into U.S. airspace without any observable risk to safety. *Id.* at a-36.

These inconsistencies would justify review of the panel majority's holding even if the FAA's policy did not infringe on congressional civil rights policy, as expressed in the ADEA, EEOC regulations and *Criswell*. But the presence of these competing policies, and the FAA's stubborn refusal to consider alternatives that would avoid a conflict with the ADEA, required that the D.C. Circuit apply a stricter standard of review than the "arbitrary and capricious" standard that was applied.

The issue here is an important one because it goes to the heart of agency rulemaking power under the Administrative Procedure Act. Although it may be proper to allow an agency great discretion when it acts solely within the confines of its own governing statute, courts should not be so deferential where agency rules intrude on the governing statutes and regulations of other agencies. Power unrestrained soon becomes power abused. The court below erred in affording the FAA's Age 60 Rule a degree of deference that was inappropriate to a regulation that deprived pilots of the civil rights guarantied to them by statute.

III

THE DECISION BELOW IS IN CONFLICT WITH THE REASONING AND OUTCOME OF DECISIONS IN THE 6TH, 7TH, AND 9TH CIRCUITS.

Although no court has held the Age 60 Rule to be invalid as applied to Part 121 pilots, other circuit courts that have reviewed the rule have reached conclusions that stand in stark conflict to the conclusions of the court below. In view of the importance of the underlying issues of administrative law and civil rights law, the need for direction from this Court is manifest.

Less than three weeks after the court below issued its decision, the Sixth Circuit Court of Appeals rendered its opinion in *Coupé v. Federal Express Corp.*, in which the court upheld the district court's holding that the Age 60 Rule constitutes a BFOQ as a matter of law for a pilot engaged solely in cargo operations. The Sixth Circuit reasoned that "The FAA adopted the age 60 rule for reasons that might well support a BFOQ defense if the FAA were the employer." 121 F.3d at 1026. Thus, while the court below holds that the Age 60 Rule supersedes the ADEA, and therefore does not require status as a BFOQ, the Sixth Circuit holds that the Rule qualifies as a BFOQ as a matter of law. The reasoning of the two circuits and the premises on which they derive their outcomes are exactly opposite.

The Ninth Circuit, on the other hand, has asserted that the Age 60 Rule does not qualify as a BFOQ, although its

holding applied to pilots who were not operating under Part 121. In *EEOC v. Boeing Co.*, the court rejected a manufacturer's contention that The Age 60 Rule could establish a BFOQ for corporate test pilots, observing that "No authority called to our attention justifies deference to an [FAA] determination in the administration of the ADEA." 843 F.2d at 1217. Moreover, the court noted that:

> There is serious doubt that the FAA rule reflects a determination by FAA that age 60 is a BFOQ as defined by the ADEA for the commercial pilots to whom it applies, much less a BFOQ for Boeing pilots. Although the FAA's Age-60 Rule has been sustained as a proper exercise by FAA's rulemaking and regulatory power, it has never been tested against ADEA's requirements for BFOQ even for the commercial pilots.

Id. at 1220.

Where the Ninth Circuit asserted that the Age 60 Rule does not qualify as a BFOQ, the Seventh Circuit criticized the factual assumptions underlying the rule in the *Aman* and *Baker* cases and warned that the rule would no longer withstand judicial review under the Administrative Procedure Act unless the FAA could produce more compelling scientific data linking the age cutoff to pilot performance. In *Aman*, a group of pilots sought to be exempted from the Age 60 Rule after being carefully screened by medical and psychological experts. On review of the FAA's blanket denial of the petitions, the Seventh Circuit remanded the case for further findings, observing that the FAA's "progress in developing an understanding of the relationship between aging and flight performance has been disappointing." 856 F.2d at 949.

On remand, the FAA analyzed the data further and again denied all the petitions. The FAA's decision was reluctantly upheld by a panel majority in the *Baker* case on the premise that the panel was "not prepared to overrule the agency in a matter of such immense sensitivity as this one," but with the admonition that "Obviously there is a great body of opinion that the time has come to move on. The agency must give serious attention to this opinion." 917 F.2d at 323. The dissenting judge bluntly termed the agency's refusal to grant exemptions "a fraud." *Id.* at 327.

Aman and *Baker* were decided before the Hilton Study confirmed that older pilots were as safe or safer than younger pilots. In addition, since those cases were decided, many foreign countries, including the 15 nation European Joint Aviation Authorities have abandoned an age 60 limit. App. B at a-73.[11] Thus, developments since *Aman* and *Baker* have further undermined any justification for an age 60 cutoff. Moreover, as the dissent noted below, a key factor in the *Baker* court's reluctance to hold the rule invalid was that the pilots in that case had the stringent burden of proving that the FAA's grant of exemptions would not impair safety. Here, the FAA is required to provide a sufficient explanation demonstrating that its actions are reasonable. See App. A at a 28, n.3, 917 F.2d at 322, n. 6 . It is highly doubtful that the precarious majority in *Baker* would have approved the rule in its current

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[11]Because of treaty obligations, these pilots may legally fly in the United States while their American colleagues may not. App. A at a-21. Some foreign courts have held that age-based retirement requirements are illegal. The Australian Industrial Relations Court reinstated a Quantas Airlines pilot who was required to retire age 60, after finding no connection between the mandatory retirement age and aircraft safety. *Christie v. Quantas Airways Limited* (No. 2), 68 IR 248 (Aust. Indus. Rltns. Ct. 1996).

posture.

The disparate outcomes of the decisions of the courts that have struggled with the Age 60 Rule and other mandatory employment age limits, manifest a more general need for the guidance and direction of this Court. As it stands, age is a bona fide occupational qualification for pilots engaged in cargo operations, *Coupé v. Federal Express*, but not for corporate pilots who carry passengers, *Tuohy v. Ford Motor Co.* It is a BFOQ for helicopter test pilots, *Williams v. Hughes Helicopters,* but not for passenger airplane test pilots, *EEOC v. Boeing*. It is a BFOQ for some flight engineers, *TWA v. Thurston,* but not for other flight engineers engaged in similar operations, *EEOC v. American Airlines* This Court's intervention is needed to establish more clear guidelines for when an employer must prove that age is a BFOQ and what criteria need to be considered in the determination of a BFOQ.

In sum, the court of appeals' opinion here conflicts with the outcome or reasoning of at least three other circuits, in addition to this Court's own opinion in *Criswell*. Its premise is antithetical to the premise of the *Sixth* Circuit in the *Coupé* case. Its result and rationale are antithetical to the Ninth Circuit's decision in *Boeing*. Its analysis of the evidence is at odds with the Seventh Circuit's analysis in *Aman* and *Baker*. Direction from this Court is needed to clarify these confusing and contradictory opinions.

CONCLUSION

This case combines important issues of administrative law and equally important civil rights issues that affect the careers of thousands of pilots and impacts all occupations in which safety can serve as an excuse for age-based prohibitions. Certiorari should be granted in order to (1) define the proper approach that courts should apply to the interpretation of conflicting statutes and regulations; (2) establish a clear standard of review for agency regulations that impair the enforcement of statutes and regulations administered by other agencies; and (3) resolve longstanding conflicts among the circuits and between the court below and this court as to the proper status of the Age 60 Rule under the ADEA.

Respectfully submitted,

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Appendix

APPENDIX A:

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PROFESSIONAL PILOTS FEDERATION, ET AL.,
PETITIONERS

v. No. 95-1604

FEDERAL AVIATION ADMINISTRATION,
RESPONDENT

Consolidated with
Nos. 96-1025, 96-1026

On Petitions for Review of Orders of the
Federal Aviation Administration

Argued: October 3, 1996

Decided: July 15, 1997

Before: WALD, GINSBURG, and RANDOLPH, *Circuit Judges.*

Nicholas H. Cobbs, argued the cause for petitioners, with whom *Michael J. Pangia* was on the briefs.

Christine N. Kohl, Attorney, U.S. Department of Justice, argued the cause for respondent, with whom *Frank W. Hunger*, Assistant Attorney General, and *Robert S. Greenspan*, Attorney, were on the brief.

Edgar N. James and *Marta Wagner* were on the brief for *amicus curiae* Allied Pilots Association. *Martha L. Walfoort* entered an appearance.

Aidan D. Jones was on the brief for *amicus curiae* Southwest Airlines Pilots' Association.

Opinion for the Court filed by *Circuit Judge* GINSBURG.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* WALD.

OPINION

GINSBURG, *Circuit Judge*: The Professional Pilots Federation and two individual pilots petition for review of two decisions of the Federal Aviation Administration: not to institute a rulemaking to relax the FAA Rule that requires commercial airline pilots to retire at age 60, and to extend application of the Rule to commuter airline operations. The Pilots contend, first, that the Rule unlawfully requires airlines to violate the Age Discrimination in Employment Act, *see* 29 U.S.C. § 621 *et seq.*, and, second, that the FAA acted arbitrarily and capriciously, in violation of the Administrative Procedure Act, when it decided to retain and expand the scope of the Rule. Finding merit in neither contention, we deny the petitions for review.

I. Background

The FAA first promulgated the Age 60 Rule in 1959 pursuant to its mandate under the Federal Aviation Act of 1958

to ensure air safety. 24 Fed. Reg. 9767 (December 5, 1959). *See* 49 U.S.C. § 44701(a)(4) (authorizing Administrator to promulgate "regulations in the interest of safety for the ... periods of service of airmen"); 49 U.S.C. § 44701(c) (requiring Administrator to regulate "in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation"); 49 U.S.C. § 44702(b)(1)(A) (requiring Administrator to consider "the duty of an air carrier to provide service with the highest possible degree of safety" when issuing an airman, air carrier, or other certificate); *Air Line Pilots Ass'n, Int'l v. Quesada*, 276 F.2d 892, 897-98 (2d Cir. 1960). The agency concluded that the Rule would promote air safety after finding "that available medical studies show that sudden incapacitation due to heart attacks or strokes becomes more frequent as men approach age sixty and present medical knowledge is such that it is impossible to predict with accuracy those individuals most likely to suffer attacks." *Quesada*, 276 F.2d at 898. The Second Circuit, reasoning that it was not for a court to substitute its own "untutored judgment for the expert knowledge" of the agency, accepted this conclusion and dismissed an early challenge to the Rule. *Id.*

The FAA has reconsidered the Rule on several occasions. In the early 1960s, the agency began, but never completed, a study to determine the feasibility of testing individual pilots over the age of 60 in order to determine whether they remained fit to fly. *See Aman v. FAA*, 856 F.2d 946, 948 (7th Cir. 1988). In 1970 the Air Line Pilots Association called upon the FAA to replace the blanket prohibition of the Age 60 Rule with a regime of individualized performance tests and medical evaluations, but the agency decided to retain the Rule because "an increase in the number of medical examinations administered to a given pilot ... would not be an effective deterrent to incapacitation inasmuch as the indices of such incapacitation are not now sufficiently

developed." *See O'Donnell v. Shaffer*, 491 F.2d 59, 61 (D.C. Cir. 1974).

In 1979 the Congress directed the National Institutes of Health to determine whether the Rule was still medically warranted. *See* Pub. L. No. 96-171, 93 Stat. 1285; *see also Pilots Rights Ass'n v. FAA*, 86 F.R.D. 174, 176 (D.D.C. 1980). In its final report, the NIH concluded that there was "no special medical significance to age 60 as a mandatory age for retirement of airline pilots" but recommended that the age 60 limit be retained nonetheless because there was still no "medical or performance appraisal system that can single out those pilots who would pose the greatest hazard because of early, or impending, deterioration in health or performance." *Report of the National Institute on Aging, Panel on the Experienced Pilots Study* 1 (August 1981).

In 1982 the FAA considered relaxing the Rule in order to allow a small group of pilots to continue flying until age 62 in order to generate data on their performance under actual operating conditions. 47 Fed. Reg. 29,782 (July 8, 1982). The FAA ultimately determined, however, that "no medical or performance appraisal system can be identified that would single out pilots who would pose a hazard to safety." 49 Fed. Reg. 14,692, 14,695 (April 12, 1984). Unable "to distinguish those pilots who, as a consequence of aging, present a threat to air safety from those who do not," the agency decided not to experiment with changing the Rule. *Id.*

The present litigation was stimulated, at least in part, by a 1993 study of the Age 60 Rule that was performed by Hilton Systems, Inc. for the FAA's Civil Aeromedical Institute. The Hilton Study correlated accident data for the period from 1976 to 1988 with pilot age and flying time. This analysis revealed "no support for the hypothesis that pilots of scheduled air

carriers had increased accident rates as they neared the age of 60." Hilton Study at 6-2. On the contrary, the study found a "slight downward trend" in accident rates as pilots neared the age of 60. The authors cautioned, however, that this decrease might have resulted from "the FAA's rigorous medical and operational performance standards screen[ing] out, over time, pilots more likely to be in accidents."

Shortly after publication of the Hilton Study the FAA announced that it was again considering whether to institute a rulemaking concerning the Age 60 Rule and invited comments from the public on various aspects of the Hilton Study. 58 Fed. Reg. 21,336 (April 20, 1993). The agency held a public hearing in September 1993 at which 46 members of the public made presentations. The agency also received more than a thousand written comments.

In July 1993 the Professional Pilots Federation filed with the FAA a rulemaking petition to repeal the Rule. The Pilots maintained that "time and empirical evidence have shown that the blanket elimination of the country's most experienced pilots is not justified in the interests of safety and, therefore, is arbitrary and capricious, and violates this country's policy of prohibiting employment discrimination on the basis of age."

In early 1995 after a series of accidents involving commuter airlines, the FAA proposed in a separate rulemaking to bring certain commuter operations, previously conducted under Part 135, under Part 121. 60 Fed. Reg. 16,230 (March 29, 1995). These operations would then become subject to the more stringent safety standards of Part 121, including the Age 60 Rule, relaxation of which the agency was still considering in the wake of the Hilton Study.

In December 1995 the FAA denied the Pilots' petitions to repeal the Age 60 Rule and decided not to institute a rulemaking in response to the Hilton Study. 60 Fed. Reg. 65,977 (December 20, 1995). The agency determined that the "concerns regarding aging pilots and underlying the original rule have not been shown to be invalid or misplaced," and concluded that the Rule was still warranted as a safety measure. Id. at 65,980. The FAA therefore retained the Rule, which provides that:

> No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under [Part 121] if that person has reached his 60th birthday.
>
> No person may serve as a pilot on an airplane engaged in operations under [Part 121] if that person has reached his 60th birthday.

14 CFR § 121.383(c) (1996). In addition the FAA adopted its proposed rule bringing under Part 121 certain commuter operations previously conducted under Part 135. 60 Fed. Reg. 65,832 (December 20, 1995). As a result, these commuter operations became newly subject to the Age 60 Rule. The Pilots petitioned this court for review of both rulemaking decisions.

II. Analysis

The Pilots challenge the FAA's decision not to institute a rulemaking to repeal the Age 60 Rule and its decision to apply the Rule to commuter airlines as violations of both the ADEA and the APA. First, the Pilots assert that by requiring the airlines to discriminate on the basis of age the Rule is in "direct conflict" with the ADEA. Second, they claim that the agency violated the APA by: (1) not affording adequate consideration

to the reasonable alternatives proposed by various commenters; (2) reaching a decision that is against the weight of the evidence; and (3) failing to provide any reasoned basis for treating older pilots differently than other groups of pilots who create as great or greater a safety risk.

A. The ADEA

The Pilots argue that the Age 60 Rule violates the ADEA because it requires the airlines to discriminate against older pilots and because the FAA need not have relied upon an age-based Rule in order to achieve its objective of air safety. The agency, we are told, could instead have implemented a scheme of medical evaluations and individualized testing in order to determine whether each pilot remains fit to fly. In any event, in the ADEA the Congress spoke directly to the role that age may play in employment decisions and the FAA cannot—as a matter of logic if not of statutory interpretation—countermand that clear statutory command through an exercise of its rulemaking authority.

The FAA responds that the ADEA speaks only to employers—including federal agencies acting in their role as employers—and therefore places no substantive limitation upon the agency's power to regulate airline safety pursuant to the mandate of the Federal Aviation Act. In the alternative, the FAA contends that if the ADEA does apply to the air safety rules it promulgates, then the Age 60 Rule comes within the exception in § 623(f)(1) of that statute for a bona fide occupational qualification. 29 U.S.C. § 623(f)(1).

The FAA bases its first point upon the central provision of the ADEA itself, which states that "it shall be unlawful for an employer" to discriminate in employment upon the basis of age. § 623(a). The FAA argues that it promulgated the Age 60 Rule

in its capacity not as an employer but as a regulator; in that capacity the agency is specifically authorized, *inter alia,* to prescribe "regulations in the interest of safety for the maximum hours or period of service of airmen." 49 U.S.C. § 44701(a)(4); *see also id.* at § 44702. Absent a provision in the ADEA comparably specific or otherwise capable of overriding the authorization of § 44701—"not withstanding any other provision of law" comes to mind—the ADEA places no limitation upon the rulemaking authority of the FAA.

The FAA also contrasts the ADEA with the Rehabilitation Act, in which the Congress expressly subjected the programmatic activities of the Government to the stricture against discrimination. *See* 29 U.S.C. § 794(a) (providing that no qualified person shall be discriminated against for a disability "under any program or activity conducted by any Executive agency"); *see also Buck v. DOT,* 56 F.3d 1406, 1408-09 (D.C. Cir. 1995). Absent a similarly plain and unequivocal expression of intent, the FAA urges that we ought not lightly infer that the Congress intended to compromise its single-minded pursuit of safety in the air.

We agree with the FAA that the ADEA places no substantive limitation upon the agency's authority to act as a regulator of the airline industry. The statute prohibits both an employer in the private sector and an agency of the federal government from discriminating upon the basis of age in making employment decisions. 29 U.S.C. §§ 623, 633(a). Nothing in the Act can plausibly be read to restrict the FAA from making age a criterion for employment when its acts in its capacity as the guarantor of public safety in the air. The general prohibition of the ADEA, addressed as it is to employers, should not be read by mere implication to override
the specific grants of authority to the FAA in 49 U.S.C. § 44701. If the Congress intends to limit the means available to

the FAA in its pursuit of air safety, we trust it will say so rather than leave the matter to the courts to infer. Therefore, we conclude that the ADEA does not limit the authority of the FAA to prescribe a mandatory retirement age for pilots; as a result, we need not reach the question whether the Age 60 Rule constitutes a bona fide occupational qualification within the meaning of § 623(f)(1) of that Act.

B. The APA Challenges

We will defer to the FAA's decisions to retain the Age 60 Rule and to bring commuter airlines under the Rule unless those decisions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983). More particularly, the agency must have offered a reasoned explanation for its chosen course of action, *see FEC v. Rose*, 806 F.2d 1081, 1088 (D.C. Cir. 1986), responded to "relevant" and "significant" public comments, *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977), and demonstrated that it afforded adequate consideration to every reasonable alternative presented for its consideration. *See Public Citizen v. Steed*, 733 F.2d 93, 103-04 (D.C. Cir. 1984).

With respect to its decision not to convene a rulemaking in order to repeal or modify the Age 60 Rule, the FAA argues that the appropriate standard of review is the even more deferential standard we apply to an agency's decision not to institute a rulemaking proceeding. *Cellnet Communication, Inc. v. FCC*, 965 F.2d 1106, 1111-12 (D.C. Cir. 1992). That more deferential standard of review is indicated, however, only when the agency has clearly shown that "pragmatic considerations" would render the usual and somewhat more searching inquiry problematic because "the agency has chosen

not to regulate for reasons ill-suited to judicial resolution, e.g., because of internal management considerations as to budget and personnel or for reasons made after a weighing of competing policies." *See Bargmann v. Helms,* 715 F.2d 638, 640 (D.C. Cir. 1983) (reviewing FAA decision not to institute rulemaking to require first-aid kits on commercial aircraft). In the case now before us the decision not to institute a rulemaking looking toward repeal of the Age 60 Rule was purportedly based upon the merits of the existing Rule. We see no need, therefore, to afford the agency more than the usual—and considerable—deference we show an agency when it adopts a rule implementing a statute it is charged with administering. We shall therefore apply the arbitrary and capricious standard of the APA.

1. Consideration of alternatives

Various parties filing comments before the FAA proposed two alternatives to the present Rule. First, they suggested periodic performance checks designed to determine, on an individual basis, whether a pilot remains fit to fly. Second, they proposed allowing a group of pilots over the age of 60 to continue flying commercial passenger aircraft in order to gather the data that the FAA would need to make a reasoned decision about whether the current retirement age of 60 could safely be moved up to perhaps age 62 or 63. The Pilots now press both alternatives upon us.

a. Periodic performance checks

The FAA rejected periodic performance checks on the ground that they only "verify the state of a pilot's performance at the time of the checks." They do not detect "early or subclinical cognitive defects that may subtly degrade performance" and "do not predict whether an individual pilot's

performance will degrade at any time in the future as a result of age." The Pilots assert that rather than afford adequate consideration to this proposal the agency blindly relied upon its 1984 determination that there are no valid tests capable of screening out pilots likely to suffer from age-related impairment. The FAA, we are told, did not even acknowledge that a detailed testing protocol had been presented to the agency during a 1985 hearing before the House Select Committee on Aging. The FAA also purportedly failed adequately to respond to the EEOC's observation that several non-Part 121 operators, most notably the Boeing Corporation, have adopted individualized testing in order to settle various suits brought against them under the ADEA. The Pilots fault the FAA for responding to the EEOC's detailed comment with the simple assertion that it had "not been apprised of the testing protocols or of the results of any such testing, ha[d] not seen them discussed in the medical literature, and ha[d] not been party to the agreements."

The FAA responds by pointing out that it did evaluate the specific testing regimens proposed by the commenters before finally concluding that testing individual pilots is an inadequate substitute for the Age 60 Rule. In the final rule document the agency observed that available tests: (1) evaluate only a pilot's present performance and cannot be used to predict the sudden onset of an age-related impairment, such as early or subclinical cognitive defects; (2) cannot measure the subtle degradation of skills that may prove serious in the cockpit; and (3) do not evaluate how a pilot responds to stress and fatigue.

The FAA contends that its response to the comment submitted by the EEOC was entirely adequate in light of the purely anecdotal evidence that the EEOC offered in support of its assertion that individualized testing has proven to be a viable substitute for a bright-line rule based upon age. The EEOC's

principal evidence is that it reached a settlement agreement with Boeing under which that company's pilots were for a time allowed to continue flying until the age of 63. The FAA acknowledges as much but is quick to point out that: (1) the EEOC lawyer who oversaw the Boeing litigation observed in a 1991 article published by the Flight Safety Foundation that the full impact of the agreement upon safety remained to be assessed; (2) no account of Boeing's experience has yet been published; (3) Boeing pilots are corporate pilots who do not fly under Part 121; and (4) a Boeing representative had testified before the agency that "neither the information uncovered as a result of this effort nor subsequent Boeing ... experience with our medical and neuropsychological protocols ... gives us confidence that means are currently available to detect or predict age-related problems which may have [an] adverse [effect] on safety."

The Pilots also claim that the agency's rejection of individualized testing for pilots over the age of 60 is inconsistent with its acceptance of monitoring and testing for younger pilots with certain known medical conditions. The FAA maintains that it did in fact offer an adequate explanation for the apparent inconsistency when it specifically found that, although a younger pilot with a diagnosed medical condition
may be monitored,

> such is not the case in aging, since there are no generally applicable medical tests that can, at this time, adequately determine which individual pilots are subject to incapacitation secondary to either acute cardiovascular or neurological events or to more subtle adverse conditions related to decline of cognitive functioning.

60 Fed. Reg. at 65,984. For example, a pilot with a diagnosed heart condition can be tested and monitored in order to

determine whether there is a significant risk that he will suffer a heart attack. The FAA allows this pilot to continue flying provided that his doctors have determined that the risk of his suffering a sudden unexpected impairment due to his heart condition is *de minimis*. There are no tests, however, that can accurately determine the risk of an apparently healthy but older pilot suddenly being stricken by any one of the many potentially disabling conditions that may accompany advancing age.

We conclude that the FAA afforded adequate consideration to the alternative of individualized testing. The FAA explained that even state-of-the-art testing cannot screen out potentially risky pilots. The EEOC did not offer any data in support of its assertion that allowing pilots to fly until the age of 63 would not compromise safety; the FAA simply cannot be faulted for failing to explain away data that are not part of the record.

Finally, we conclude that the FAA adequately explained the difference in treatment it affords to pilots over the age of 60 who have no known medical condition and to younger pilots who do have a known medical condition. The risk of allowing the younger pilot to continue flying is negligible provided—and it is this critical proviso that our colleague in dissent seems to ignore—that "the agency has been able to develop a means of assessment and surveillance specifically
designed to demonstrate the individual's capabilities and to identify any adverse changes." Doctors are not only unable to determine whether an older but apparently healthy pilot will be afflicted with a dangerous condition; they are also unable to predict with which of the myriad conditions that accompany

advancing age an individual pilot is likely to be afflicted.* The FAA cannot practically monitor for the onset, and thereby avoid the consequences, of all potential hazardous medical conditions in an older pilot. Therefore, it was not unreasonable for the FAA to allow younger pilots with particular medical conditions to continue flying while, at the same time, not allowing pilots over the age of 60 to do so.

b. Selecting a group of pilots over the age of 60.

The FAA also rejected the suggestion that a group of pilots over the age of 60 be permitted to continue flying under Part 121 in order to generate the data needed for the FAA to make an empirical judgment about whether the Age 60 Rule is reasonable. The Pilots contend, without elaboration, that the FAA failed to offer adequate consideration to this alternative. The FAA responds that it rejected this proposal because it did not have confidence that it could identify a cohort of vintage pilots who would not be susceptible to subtle impairments or to sudden incapacitation:

> The FAA withdrew [a similar plan] in 1984 because valid selection tests for the group did not exist. The FAA was concerned that, without valid selection tests, these pilots would create an unacceptable safety risk in part 121 operations. The commenter does not suggest any data that indicates [sic] that a group described [sic] would be able to identify any such tests. The FAA has the same concerns today.

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*Contrary to the impression created by the dissent, the FAA did not suggest "that it is more difficult to monitor known medical conditions in an older pilot than in a younger pilot." Dissent at 3-4, n.3. Rather, the agency's concern was that it is more difficult to detect an unknown medical condition than to monitor a known medical condition.

60 Fed. Reg. at 65,984.

As long as the FAA cannot identify good candidates for the experiment that the Pilots propose, we can hardly conclude that its refusal to run the experiment is arbitrary and capricious. On the contrary, it would be unreasonable for the court to require that the FAA periodically suspend its safety regulations in order to determine anew, upon the basis of (potentially disastrous) experience, whether they are still needed. Nor have the Pilots shown that such experimentation with the safety of passengers is permitted by the Federal Aviation Act. Indeed, the Congress arguably forbade it by requiring the FAA to "consider the duty of an air carrier to provide service with the highest possible degree of safety in the public interest." 49 U.S.C. § 44701(d)(1)(A).

Nothing in the record suggests that the FAA has, but refuses to act upon, the "valid selection tests" it would need in order to identify a group of low-risk pilots over the age of 60 who might safely continue to fly. Therefore we must conclude that the FAA did not act arbitrarily and capriciously— and was quite possibly acting as required by law—when it refused to waive the Rule in order to allow a selected group of pilots to fly commercial passenger aircraft after attaining the age of 60.

2. The rationality of age-based risk assessment

The Pilots assert that, in the course of defending the Age 60 Rule, the FAA drew several distinctions that reveal a " 'basic inconsistency in its reasoning' by applying similar concepts differently in parallel situations." *See Air Line Pilots Ass'n v. FAA*, 3 F.3d 449, 453 (D.C. Cir. 1993). In particular, the Pilots maintain that the FAA's treatment of younger pilots, of pilots who do not fly under Part 121, and of foreign pilots

cannot be reconciled with its treatment of Part 121 pilots over the age of 60.

a. Younger pilots

The Pilots claim that it is arbitrary and capricious for the FAA to ground older and more experienced pilots while allowing younger pilots to fly even though a younger pilot is more likely than an older pilot to cause an accident. To the commenters who argued that this is a contradiction, the FAA responded (in essence) that, however valuable experience may be, it is no match for a heart attack. Implicit in the FAA's decision is the view that a 40-year-old pilot with 15 years of experience is a safer bet than a 61-year-old pilot with 36 years of experience. The 61-year-old pilot's additional experience is outweighed, that is, by the heightened probability that he will lose his ability to fly safely—whether through gradual wear and tear or a sudden episode—and the disastrous consequences if he does. The FAA also maintains that the Pilots' argument is fundamentally flawed because it assumes that the FAA based its decision to retain the Age 60 Rule solely upon accident data. Accident data are one consideration, among many, that influenced the FAA's decision to select age 60 as the cut off; other data, such as the percentage of pilots suffering sudden heart failure, or a significant loss of vision or hearing, were also considered, and those data provide ample grounds for drawing a distinction between younger and older pilots. Indeed, according to the agency, all studies of the subject come to the conclusion that some mandatory retirement age for pilots is appropriate. The studies diverge only with regard to the precise age at which retirement should be mandated.

Finally, the FAA questions the assumption, implicit in the Pilots' argument, that relatively inexperienced pilots are replacing more experienced pilots as a result of the Age 60

Rule. Young pilots are rarely if ever given command of an aircraft before they have had significant experience. Older pilots, therefore, are typically "replaced by pilots who have substantial experience as pilots in the first officer position, and often as flight engineers before that."

We conclude that the FAA adequately justified its decision to distinguish between younger pilots and those over the age of 60. The agency reasonably concluded that the risk inherent in allowing an older pilot to fly outweighs the benefit of having a more experienced person in command. In contrast, the risk of allowing a younger pilot to serve in a non-command role is negligible while the benefit of allowing him to gain experience is high.

b. Younger pilots with known medical conditions

The Pilots observe that the FAA sometimes will allow a younger pilot with a serious medical problem to continue flying even if his problem is characterized by a high rate of recurrence. It is arbitrary and capricious, the Pilots assert, to forbid an apparently healthy pilot over the age of 60 to fly because of the risk that he might have a first heart attack while, at the same time, allowing a younger pilot to fly in spite of the dramatically higher statistical risk that he might suffer a second heart attack.

The FAA defends its policy of granting exemptions to pilots who have experienced a serious medical problem on the ground that it does so only when the risk of a recurrence can be assessed adequately. A known condition can not only be monitored but also, as in the case of alcoholism and some heart conditions, controlled:

When a special issuance medical certificate is granted,

> the condition in question has been clearly identified, and the agency has been able to develop a means of assessment and surveillance specially designed to demonstrate the individual's capabilities and to identify any adverse changes. If that is not possible, certification is not granted.

60 Fed. Reg. at 65,984. Meanwhile, the subtler forms of physical and mental decline that may accompany aging often cannot be detected, let alone monitored or controlled.

In sum, the FAA determined that there are techniques for monitoring the health of pilots with certain medical conditions but that there is not yet any way of predicting whether and when an older pilot is likely to develop a condition with a potentially serious impact upon his ability to fly an airplane safely. This difference between the two groups is fully adequate to warrant the distinction that the FAA has drawn between them.

c. Corporate aircraft and air taxis.

The Pilots next assert that the FAA has applied the Age 60 Rule arbitrarily without regard for either the type of aircraft being flown or the type of service being provided. Thus, the Rule applies to cargo carriers, where no passengers are at risk, but not to corporate aircraft and air taxis, where passengers are at risk. The Pilots claim that this is utterly irrational. The FAA responds that the distinction between common carriers of passengers and cargo, which are subject to the Age 60 Rule, and private carriers of passengers and cargo, which are not, is found in the governing statute. The Congress directed the FAA to consider the differences between "air transportation," defined as the transportation of passengers or property by a common carrier, 49 U.S.C. §§ 40102(a)(5), (24), & (25), and "other air

commerce." *See* 49 U.S.C. § 44701(d)(1)(B). The Congress also specifically required the FAA to consider the duty of air carriers, defined elsewhere as common carriers, 49 U.S.C. §§ 40102(a)(2), (5), (24), & (25), "to provide service with the highest possible degree of safety in the public interest." *See* 49 U.S.C. § 44701(d)(1)(A). Accordingly, the agency considers it appropriate to regulate common carriers more stringently than it regulates "other air commerce." Insofar as that leaves corporate aircraft and air taxis beyond the reach of the Rule, the distinction is not unreasonable, says the agency: corporate pilots do not serve the public as do common carriers; and while air taxis do serve the public, unlike commuter airlines their safety record has not been a source of concern for the FAA or the NTSB, perhaps because their operations—typically involving only a few short haul passengers and less sophisticated equipment—place lesser demands upon their pilots.

We conclude that the FAA adequately explained its decision to apply the Age 60 Rule to pilots of commuter aircraft but not to pilots of corporate aircraft and air taxis. The Congress clearly left the FAA free to regulate corporate aircraft operations at less than the "highest possible degree of safety." *See Quesada*, 276 F.2d at 898 ("The Administrator did not act unreasonably in placing greater limitations on the certificates of pilots flying planes carrying large numbers of passengers who have no opportunity to select a pilot of their own choice. The Federal Aviation Act contemplates just such distinctions between the regulations governing 'air commerce' and those governing other air transportation").

As for excluding air taxi operations while extending the Rule to commuter operations, we accept the FAA's point that the NTSB had asked the agency specifically to consider extending the Rule to commuter operations. 60 Fed. Reg at

16,235. In responding to the NTSB's request, the FAA was not obliged—contrary to our colleague in dissent, see dissent at 6—to consider whether the Rule might further improve safety if applied to still other operations. Nor, we note, could such an extension of the Rule in any way benefit the petitioners; indeed, as the Seventh Circuit has observed, it would foreclose them from a source of post-60 employment. *See Starr v. FAA*, 589 F.2d 307, 313 (1978).

d. Foreign pilots

Finally, the Pilots claim that it is arbitrary and capricious for the FAA to allow a foreign carrier operating in U.S. airspace to employ pilots who are over the age of 60 while prohibiting a U.S. common carrier from employing even the healthiest of pilots beyond that age. The FAA responds that as a signatory of the Chicago Convention, *see* 61 Stat. 1180, T.I.A.S. 1591 (December 7, 1944) the United States is required to recognize as valid any license issued by any other signatory, provided that the requirements underlying such licenses are "equal to or above the minimum standards which may be established from time to time pursuant to this convention." *See* 61 Stat. at 1189; *see also* 49 U.S.C. §§ 40105(b)(1)(A) & (B) (FAA must "act consistently with obligations of the United States Government under an international agreement," and "shall consider applicable laws and requirements of a foreign country"). The standards that have been established under the Chicago Convention permit (but do not require) a country to allow commercial pilots to fly beyond the age of 60. For this reason, the FAA maintains, it must as a matter of law allow foreign pilots to fly notwithstanding the Age 60 Rule.

We agree with the FAA that the mandate of § 40105 requires this inconsistency in the treatment of domestic and foreign carriers and their pilots. Perhaps, however, experience

with foreign pilots over the age of 60 flying commercial aircraft in U.S. airspace will provide the FAA with the comparative data it needs in order to evaluate empirically the continuing need for the existing rule.

3. The weight of the evidence

The Pilots assert that the FAA not only placed unwarranted emphasis upon evidence that supports retaining the Rule but also downplayed significant evidence tending to undercut that support. Thus, the FAA stressed that an NIH panel had found in 1981 that pilot performance deteriorates with age while ignoring the same panel's recommendation that selected pilots over the age of 60 be allowed to fly in order to generate data about the performance of older pilots.

The FAA responds that it did not give short shrift to the NIH's recommendation that a limited number of older pilots be allowed to fly in order to generate data. The FAA remains unwilling to act upon this proposal because it knows of no method for selecting a group of low-risk pilots over the age of 60.

We agree with the FAA that it did not ignore the recommendations contained in the 1981 report of the NIH. As we have seen, *see* § II.B.1 above, the FAA decided not to allow pilots to continue flying past the age of 60 because it did not know then, as it does not know now, of any way to identify a group of pilots over the age of 60 who are less likely than other equally venerable aviators to experience some loss of their faculties.

The Pilots also fault the FAA for failing to acknowledge that the NIH has withdrawn its support for the Rule. The Pilots here refer to the declaration of a former director of the National

Institute on Aging, Dr. T. Franklin Williams, that he had testified in 1985 before the House Select Committee on Aging "that it was the official position of the NIA that testing of pilots after age 60 was feasible and desirable."

The FAA counters that it did not acknowledge that the Institute had withdrawn its support for the Rule because the record does not establish any such change of position. The only Institute report in the record is the one prepared in 1981. Neither the NIH nor the NIA has conducted another similar study since that time. Only Dr. Williams' declaration, submitted in litigation to which the FAA was not a party and reproduced in the present rulemaking record, is offered in support of the proposition that the NIA "formally abandoned" its earlier position. Moreover, that declaration is in some tension with Dr. Williams' statement before the House Committee on Aging that he did not intend "to speak for or against the retirement age rule," and with his somewhat hesitant assertion that "we can probably reliably test cardiac functioning and with reasonable reliability identify risk for coronary events in older as well as younger persons."

We conclude that the FAA was under no obligation to acknowledge Dr. Williams' post hoc characterization of testimony that was never submitted to the agency. In any event, Dr. Williams did not state in his testimony that the NIH had formally abandoned the earlier study, nor did he give any explanation as to why the NIH would do so. The declaration of Dr. Williams contained no new evidence bearing upon the validity of the Age 60 Rule.

The Pilots also criticize the FAA for rejecting the proposed alternative of screening older pilots through performance checks without acknowledging that the NIH advocates that approach. As discussed above, *see* § II.B.1, the

FAA afforded adequate consideration to the merits of this alternative and concluded that medical science has not yet advanced to the point of being able to predict who will experience age-related deterioration. We see no reason why the FAA should be faulted for failing to name the supporters of the proposal as long as the agency adequately considered the merits of the idea. *See Brae Corp. v. United States*, 740 F.2d 1023, 1067 (D.C. Cir. 1984) ("Although the Commission has an obligation to identify and ponder all relevant issues, it need not mention by name every commentator whose grievance it examines").

The Pilots also question the FAA's use of the Hilton Study. That study concluded that the available data reveal no increase in the accident rate of pilots nearing age 60, but cautioned that there are no data available with respect to pilots over the age of 60. Acknowledging that the question of when a pilot should be required to retire must be answered "very conservatively because of the possibility of catastrophic results," the study concluded that "one could cautiously increase the retirement age to age 63." The Pilots claim that the FAA did not adequately explain its failure to adopt this recommendation.

The FAA maintains that it regarded the Hilton Study as an inadequate basis upon which to change its policy because the study considered only accident data; a change of policy would have to take account of "data on vision, reaction time, judgment, circadian rhythm and many other neurobehavioral and physiological measures." The FAA also questioned whether it was appropriate to draw an inference about pilots who fly commercial passenger aircraft from statistics pertaining to pilots who fly cargo transports, and therefore have a different flying pattern that may subject them to lesser levels of fatigue and stress; Hilton drew the inference because it lacked more

relevant data pertaining to commercial passenger pilots over the age of 60 (a null set).

The FAA may seem to have created something of a Catch-22 by announcing that it will not allow older pilots to fly until it has experiential data demonstrating the continued ability of such pilots to fly safely. On the other hand, it hardly seems reasonable to require that the Administrator periodically put his hand into the fire in order to ensure that he has precisely assessed the danger that it poses. If the FAA was justified in imposing the Rule in the first place then we cannot say that, simply because it is the Rule itself that blocks the generation of data necessary to reconsider the Rule, it was unreasonable for the FAA to find that it lacks those data. In sum, we hold that the FAA's decision not to convene a rulemaking to revise the Age 60 Rule was not arbitrary and capricious in violation of the APA.

III. Conclusion

We hold that the ADEA does not limit the authority of the FAA to regulate air carriers in the interest of safety. Because we also conclude that the FAA was not arbitrary and capricious, in violation of the APA, in deciding not to conduct a rulemaking for the purpose of amending the Age 60 Rule, the petitions for review are

Denied.

WALD, *Circuit Judge*, concurring in part and dissenting in part: The FAA has determined that the progressive anatomic, physiological, and cognitive decline generally associated with aging means that all pilots over the age of 60 represent too great a threat to aviation safety to be allowed to fly in part 121 operations, which constitute by far the bulk of commercial common carrier operations.[1] The FAA based this determination not on evidence demonstrating that pilots over 60 perform less well than pilots under 60, but rather on the claim that there is no accurate means to identify which pilots are particularly at risk of suffering a sudden incapacitation or more subtle deterioration in their abilities and the age of 60 was within the age range where the incidence of diseases associated with aging sharply increases. This argument is essentially the same as that which the FAA offered when it first adopted the Age 60 Rule in 1959. The agency continued to adhere to the position that the Age 60 Rule is necessary to ensure the highest level of aviation safety despite the medical and technological developments over the ensuing nearly four decades, despite a growing trend among foreign aviation authorities to allow pilots over 60 to fly, and despite a recent report commissioned by the FAA which concluded there was no evidence of an increase in accidents associated with older pilots at least up to age 63.

The majority concludes that this decision by the FAA does not violate the Age Discrimination in Employment Act ("ADEA") and satisfies the Administrative Procedure Act's

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[1]Up until 1995, part 121 governed common carrier operations involving aircraft with more than 30 seats or more than 7,500 payload capacity. In 1995, the FAA extended part 121 to cover airlines in scheduled passenger carrying operations with 10 to 30 seats and turbojets regardless of seating capacity. *See Commuter Operations and General Certification and Operation Requirements*, 60 Fed. Reg. 65,832 (1995).

("APA") prohibition on arbitrary and capricious agency action. I agree that the ADEA does not directly govern the FAA in its role as a regulator, and thus the FAA need not prove that the Age 60 Rule is a bona-fide occupational qualification for pilots. But I believe that the FAA's justification for the rule simply does not pass muster under the APA.[2] It may be the case that our current medical knowledge and testing protocols are unable to identify those older pilots who are at risk of sudden incapacitation or subtle deterioration in functioning, so that an arbitrary across-the-board age limit remains the only reliable means of achieving the highest possible level of aviation safety. However, the FAA has not yet provided an adequate justification on this go-round for its conclusion that this situation still exists, nor for its determination that aviation safety requires all common carrier pilots, even those carrying cargo only, to be subject to the age limit but not corporate or air-taxi pilots. The FAA's decision also suffers from a reliance on flawed and inapplicable studies of accident rates. Perhaps hardest to swallow is the FAA's continued refusal to try to obtain medical or performance data on older pilots at the same time as it claims that such evidence is required before any change in the rule can be countenanced. The agency's complacent acceptance of this Catch-22 situation, particularly given that the result is the continuation of a government-imposed regime of age discrimination, seems to me the epitome of arbitrary action.

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[2]Although I disagree with the majority's analysis of the FAA's decision under the APA, I concur with the assessment that our usual standard of APA arbitrary and capricious review applies here, even though refusals to initiate rulemaking ordinarily are accorded particular deference by a reviewing court, because the FAA based its refusal to initiate a rulemaking to rescind the Age 60 Rule not on pragmatic resource concerns but on the merits of the rule. *See* Majority opinion ("Maj. op.") at 8.

I. THE FAA'S FAILURE TO OFFER AN ADEQUATE EXPLANATION OF THE NEED FOR THE AGE 60 RULE

The core of the APA's prohibition on arbitrary and capricious agency action is the requirement that an agency must provide a reasoned explanation for what it does. While "[t]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency," neither may a court sanction agency action when the agency merely offers conclusory and unsupported postulations in defense of its decisions or when it ignores contradictory evidence in the record and fails to justify seeming inconsistencies in its approach. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983); *accord Dickson v. Secretary of Defense*, 68 F.3d 1396, 1404-05 (D.C. Cir. 1995). The FAA's explanation of its decision to retain the Age 60 Rule suffers from all of these defects.

The FAA currently grants medical exemptions to pilots under 60 who are at risk of sudden incapacitation or subtle deterioration in functioning because of known medical conditions, but refuses to grant exemptions to pilots over the age of 60 who are at risk of these same effects because of aging. In its decision, the FAA argued that this differential treatment of younger pilots and older pilots is merely a reflection of the state of medical technology; according to the FAA, there are tests by which the status of a known cardiovascular or neurological condition can be reliably monitored, but there are no tests by which the presence of such a condition can be reliably determined. The majority accepts this claim as an established fact, but the FAA cites no evidence in its support and it certainly is not intuitively clear why the difference between being at risk of sudden incapacitation or subtle deterioration because of known medical conditions and being at

risk of the same effects because of aging should produce radically different diagnostic capacities. *Cf. Baker v. FAA*, 917 F.2d 318, 321 (7th Cir. 1990); *see also id.* at 325 (Will, J., dissenting).[3] If the difficulty in the latter instance is the lack of certainty regarding the pilot's health, why not simply presume that the older pilot does in fact suffer from conditions that could

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[3]In *Baker*, the Seventh Circuit commented that it was not clear "[e]xactly how this distinction [between younger pilots with known conditions and older pilots at risk of the conditions] applies as a practical matter," but upheld the FAA because petitioners were seeking exemptions from the Age 60 Rule and thus bore the "burden [of] present[ing] persuasive evidence that granting exemptions would not impair safety." 917 F.2d at 322. Here, however, petitioners are challenging the rule itself under the APA, and the APA requires the FAA to provide a sufficient explanation demonstrating that its actions are reasonable. *Cf. id.* at 322 n.6.

Contrary to the majority's thesis, Maj. op. at 10-12, there is nothing in the record to support the idea that it is more difficult to monitor known medical conditions in an older pilot than in a younger pilot; nor is there anything—beyond the FAA's bare assertion that "there are no generally applicable medical tests that can, at this time, adequately determine which individual pilots are subject to" medical conditions associated with aging, Joint Appendix ("J.A.") at 76—to support the notion that it is harder to diagnose such conditions in the first place in an older than in a younger pilot. The only possible difference is that disabling conditions—whether detected or not—may be more likely to occur in older than in younger pilots. *But see infra* note 4 (FAA's evidence is ambiguous on question of whether age 60 is the appropriate cut-off to guard against age-related decline). Yet without evidence that such conditions are more easily detected in younger pilots, this potential difference does not suffice to justify the FAA's Age 60 Rule. Indeed, common sense suggests that examining physicians would be more likely to suspect, check for, and thus discover disabling conditions in the older pilots. Even if that were not the case, however, the possibility that older pilots are more subject to disabling medical conditions than younger pilots could be readily addressed by more frequent and thorough medical testing.

cause these effects and then determine whether the pilot is safe to fly by means of the same tests that are used to monitor pilots with known conditions?

Nor can the FAA's differential treatment of older and younger pilots be explained on the grounds that the age-related conditions that pose a concern in regard to older pilots are different from those found in younger pilots. The record makes clear that the FAA allows younger pilots to fly who have been diagnosed with cardiovascular disease, even though it also lists cardiovascular disease as one of the potential causes of sudden incapacitation and subtle deterioration in older pilots. *Age 60 Rule*, 60 Fed. Reg. at 65,983-84. In any event, it is the potential effects of the medical conditions associated with aging, and not the conditions *per se*, that pose a risk to aviation safety, and the FAA allows younger pilots to fly with conditions that could produce the same effects. For example, while the FAA puts great emphasis on the subtle decline in cognitive functioning that accompanies aging, the FAA allows younger pilots to fly with various conditions, such as neurological and psychological disorders or alcoholism, that potentially could undermine a pilot's cognitive abilities. J.A. 206, 284, 611-12, 678. The FAA nowhere explains why the same tests that it employs to assess whether younger pilots with these conditions possess the level of cognitive functioning required to fly safely cannot be used to make the same determination regarding older pilots.[4]

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[4]In addition, if the possibility of an age-related cognitive decline is to be the linchpin of the FAA's defense of the Age 60 Rule, then the agency should provide a more in-depth discussion than it currently does of why 60 is an appropriate age cut-off to guard against this phenomenon. In its decision the FAA identifies the phenomenon of age-related cognitive decline, but provides no indication of when such decline impacts on an individual's ability to function. The decision also

The FAA's failure to explain adequately its different treatment of younger pilots and older pilots when both are at risk of sudden incapacitation or subtle deterioration in functioning is not simply a minor deficiency in its analysis. The heart of the FAA's defense of the Age 60 Rule is its claim that medical knowledge does not provide a means by which those pilots at risk of these effects can be accurately identified. If the tests that the FAA currently uses to monitor younger pilots with known conditions that might cause such effects could be used to monitor older pilots at risk of these conditions, then there would be no need for the rule.

A similar lack of reasoned analysis characterizes the FAA's explanation of the scope of the Age 60 Rule. The rule currently applies to all part 121 pilots, including part 121 pilots that work solely in cargo operations. It also applies *only* to part 121 pilots; other pilots—such as corporate pilots, test pilots, inspectors, and air-taxi pilots—are not covered. The FAA, defending its application of the Age 60 Rule to all and only part 121 operations, noted simply that Congress required the FAA in promulgating safety regulations to consider the duty of air carriers, which transport passengers or property by aircraft as a common carrier, to perform their services with the highest

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comments that "[o]ne in 10 persons over age 65 and nearly half of those over 85 have Alzheimer's disease alone, and increasingly it is found in people in their 40's and 50's." J.A. at 72. Without any indication of whether the incidence of Alzheimer's increases with age before 65, this statement does not support an across-the-board age cutoff of 60. *See also* Institute of Medicine, *Airline Pilot Age, Health and Performance: Scientific and Medical Considerations*, J.A. at 215 (noting that the prevalence of dementia before 65 has been estimated at 1 percent, while the prevalence after 65 has been estimated at 5 percent); J.A. at 638-41 (affidavit of former Director of National Institute on Aging arguing that evidence on neurological and neuropsychological health does not support an age cut-off of 60).

possible degree of safety in the public interest and to take account of the differences between air carriers and other forms of air commerce. *See Age 60 Rule,* 60 Fed. Reg. at 65,985. According to the majority, this statement suffices to explain the FAA's refusal to apply the Age 60 Rule to non-air carrier pilots, such as corporate pilots, because "Congress clearly left the FAA free to regulate corporate aircraft operations at less than the highest possible degree of safety." Maj. op. at 16. But even if Congress did not require the highest possible degree of safety for non-air carrier operations, it did authorize the FAA to prescribe regulations that the FAA "finds necessary for safety in air commerce operations." 49 U.S.C. § 44701(a)(5) (1994). Thus, what is needed before we can conclude that the FAA's exclusion of non-air carrier operations from the Age 60 Rule is reasonable is some explanation as to why the rule is not required to achieve the level of safety that the FAA believes is appropriate for non-air carrier operations. Such an explanation is not to be found anywhere in the FAA's decision.

Further, the FAA's citation of the duty of air carriers to operate with the highest possible degree of safety does not explain why the FAA applies the Age 60 Rule to some but not all air carriers. At the same time as it issued its decision refusing to rescind the Age 60 Rule, the FAA also promulgated a final regulation extending the rule to commuter operations as part of a shift of most commuter airlines to part 121. However, as applied to commuter operations the Age 60 Rule will not be fully effective for four years. The FAA justified this four year delay in terms of the burden the rule would impose on commuter airlines and commuter pilots; it emphasized that commuter airlines have invested money in training pilots in the expectation they could fly past 60 and will be subject to numerous other new regulations in the immediate future as a result of the shift to part 121, while commuter pilots have not planned on leaving their positions at 60. These are all sensible

reasons to delay enforcement of the Age 60 Rule, but they are difficult to reconcile with the FAA's citation of the duty of air carriers to perform with the highest degree of safety in defending the application of the rule to all part 121 operations. Why, if this duty does not allow the FAA room to consider the differences between cargo and passenger operations or the burden on pilots under part 121, does it allow the FAA to take economic and fairness concerns into account in regard to commuter operations?

The FAA also provides no explanation for why duty to perform with the highest degree of safety possible is consistent with the continued exclusion from the Age 60 Rule of air-taxis, which are air carriers but not regulated under part 121. The FAA's only reference to air-taxis comes not in its age 60 decision but in its proposal to shift commuter operations to part 121, and consists merely of the statement that air-taxis "are unlike commuter or major air carrier operations," along with the comment that the FAA was only asked to put commuter operations under part 121. *See Commuter Operations and General Certification and Operations Requirements*, 60 Fed. Reg. 16,230, 16,235 (1995). The majority maintains that the exclusion of air-taxi operations from the Age 60 Rule is reasonable simply because the FAA was not asked to extend the rule to such operations. I find this argument wholly unpersuasive and wide of the mark. The question is not whether the rule should be extended to air-taxi operations, but rather whether the FAA's application of the rule to all air carrier operations coming under part 121 was reasonable. Given that its defense of the application of the Age 60 Rule to all part 121 operations was simply a citation of the air carrier's heavy duty of safety, the FAA has an obligation to provide some

explanation as to why this duty does not require non-part 121 air carrier operations to be subject to the Age 60 Rule as well.[5]

A third deficiency in the FAA's decision is its reliance on flawed and inapplicable studies of accident rates. As the majority details, one instigating factor behind petitioners' request for a rulemaking on the Age 60 Rule was the 1993 Hilton report on the relationship between pilot age and accident rates. This report, commissioned by the FAA, determined that there was no evidence of increased accident rates for air carrier pilots as they neared 60, and if anything a slight downward trend. Based on its analysis of pilots over the age of 60 flying in operations not covered by the Age 60 Rule, the report concluded that the age limit for part 121 pilots could be extended from 60 to 63. The FAA concluded, however, that the Hilton report did not justify rescission of the Age 60 Rule or an increase in the age cutoff.

The FAA based its rejection of the Hilton report in large part on the fact that earlier studies had found an increase in accident rates. But the record indicates that many of these studies are seriously flawed. For example, the FAA described in great detail the conclusions of a 1983 report that found a substantially higher accident rate for pilots over 60 than for

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[5]The majority also remarks that extension of the Age 60 Rule to air-taxi operations would not benefit petitioners, since it would only further restrict the opportunities available to pilots over the age of 60. But again, the petitioners' challenge is to the FAA's claim that the duty of air carriers to perform with the highest degree of safety is a sufficient basis to justify application of the rule to all part 121 operations, not to the FAA's exclusion of air-taxi and other non-part 121 air carrier operations from the rule. If the FAA were to determine that the differences between different types of part 121 operations allowed pilots over the age of 60 to fly in some instances, more opportunities for older pilots would be created.

younger pilots. While the FAA noted that several commentators disagreed with the methodology used in this report, it never explained why, despite these methodological problems, the 1983 report retained any evidentiary value. As the Seventh Circuit commented, these problems—such as including millions of nearly accident free air carrier miles in determining the accident rate for pilots under 60 even though as a result of the Age 60 Rule no air carrier miles are available in determining the accident rate for pilots over 60, and calculating a single accident rate for all pilots in a ten year cohort—mean that the 1981 report is, at best, of "very limited usefulness." *Baker*, 917 F.2d at 320-21 & n.1; *accord* J.A. at 100-01, 659; *see also* J.A. at 101-02, 500-01, 518-20 (criticisms of the Office of Technology Assessment report and the second Golasewski report). The FAA also relies on a National Research Council report that found car accident rates increased for older drivers, arguing that the lack of part 121 pilots flying past 60 necessitated the use of surrogate data to assess the performance of older pilots and that car accident data was a relevant comparison because both flying and driving a car require good reflexes and judgment. But, again as the Seventh Circuit has noted, "[t]he connection between automobile drivers and pilots itself seems tenuous given the pilots' training, demonstrated proficiency, medical fitness, etc." *Baker*, 917 F.2d at 321; *see also* J.A. at 504. The FAA does not acknowledge these differences or explain why, even so, car accident data is relevant.

II. The Need for Evidence on Older Pilot Safety and the FAA's Refusal to Obtain It

These deficiencies in the FAA's justifications for the Age 60 Rule lead me to conclude that the FAA's decision to retain the rule fails the reasoned decisionmaking requirements of the

APA. Even without them, I believe that the FAA's refusal to try and obtain the evidence it claims is necessary to rescind the rule would require us to hold that its decision was arbitrary.

In its decision, the FAA emphasizes that what is required before a conclusive assessment of the contribution of the Age 60 Rule to protect aviation safety can be reached is medical and performance data on pilots over 60 serving in air carrier operations. The importance of such data was also underscored by the National Institutes of Health ("NIH") in its 1981 report on the Age 60 Rule, and the need for such directly relevant data is hard to deny. But the FAA simultaneously refuses to allow any over-60 pilots whose performance and health could be studied to generate this data to fly in air carrier operations, even pilots who have been subjected to rigorous medical and performance screening. The FAA defended its refusal to allow such a study of older pilots on the basis of the same argument that it uses to justify retention of the Age 60 Rule in general—namely that there is no reliable means for selecting pilots to participate in the study who were not at risk of sudden incapacitation or subtle deterioration in their abilities, and in the absence of such selection tests the study would represent too great a threat to aviation safety.

The flaws in the FAA's reasoning discussed above make it difficult to credit the FAA's conclusion that such a study would pose an unacceptable risk to aviation safety. If accommodating the reasonable expectation of commuter airlines and commuter pilots justifies delaying application of the Age 60 Rule to commuter operations, then surely the pressing need for data on older pilot health and performance justifies allowing a carefully screened group of pilots to fly past 60 as part of a systematic study of older pilots. And the FAA's contention that there is no means by which to safely select participants for such a study is undercut by the agency's claim that it can safely

monitor younger pilots with known conditions that could result in sudden incapacitation or subtle deterioration in functioning. In addition, many experts who study the Age 60 Rule have argued that a carefully screened group of over 60 pilots could safely be allowed to fly as part of a systematic study. For example, the NIH report, which the FAA itself describes as "the most comprehensive study yet performed of the issues involved in age-related retirement of airline pilots," *Age 60 Rule*, 60 Fed. Reg. at 65,982, recommended that the FAA undertake such a program and provided a general description of what would be required. Thus, clearly the authors of the NIH report, who were national experts on the medical conditions associated with aging, believed that such a study could be safely undertaken. *See* J.A. at 179-81; *see also id.* at 471-73 (testimony of Dr. James Hickman of the Mayo Clinic to the same effect); *see generally* Andreas E. Struck et al., *Multidimensional Risk Assessment versus Age as Criterion for Retirement of Airline Pilots*, 40 J. AM. GERIATRIC SOC'Y. 526, 530 (1992) (arguing that under an improved medical certification procedure conditions that might cause sudden incapacitation or subtle deterioration in functioning "would most likely be identified" and advocating an increase in the mandatory retirement age for pilots to 70), *reprinted in* J.A. at 622; Charles E. Drebing et al., *Early Detection of Cognitive Decline in Higher Cognitively Functioning Older Adults*, 8 NEUROPSYCHOLOGY No. 1, 31, 35 (1994) (analyzing data on a battery of tests designed to screen for cognitive decline and concluding that the battery "exhibits a relatively high degree of accuracy").

In any event, recent developments make it possible for the FAA to obtain medical and performance data from pilots flying in part 121 operations. Europe's Joint Aviation Authority as well as several Asian countries now permit pilots to fly past age 60, and by treaty these pilots must be allowed to fly in U.S. airspace. As the majority notes, this fact creates a natural

source of exactly the sort of information on older pilots that is needed. Another seemingly valuable source of data on pilot functioning are commuter pilots over 60 who will be allowed to fly for four years after commuter operations are shifted under part 121. A third potential source is non-part 121 operators who have agreed to allow pilots to fly past 60 pursuant to consent decrees with the Equal Employment Opportunity Commission. At no point in its decision, however, does the FAA suggest that it will make any efforts to obtain data on older pilot functioning from any of these sources.

Ordinarily, an agency's failure to try and obtain data needed to initiate a rulemaking would not be arbitrary; agencies must be allowed to set their own agendas and allocate their resources as they see fit. *Cf. Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985). But circumstances surrounding the FAA's retention of the Age 60 Rule are not ordinary. For nearly forty years, the FAA has argued that the Age 60 Rule is necessary to ensure the highest level of aviation safety but it has yet to supply the direct evidence of older pilot health and performance that is needed to support this proposition. *See, e.g., Aman v. FAA*, 856 F.2d 946, 948 (7th Cir. 1988) (commenting that "the agency's progress in developing an understanding of the relationship between aging and flight performance has been disappointing"). The Age 60 Rule also exacts substantial costs; pilots are forced to end their careers even though they are healthy and perfectly able to fly and the flying public is deprived of the valuable expertise that these pilots offer. These costs do not on their own make the Age 60 Rule unreasonable, since they may be unavoidable if aviation safety is to be assured only in this way, but their presence makes it incumbent on the FAA to try to obtain the evidence required to fully and accurately assess the need for the Age 60 Rule.

Most importantly, the Age 60 Rule stands as an instance of government-mandated age discrimination for a particular group of employees. The ADEA manifests our country's rejection of measures that discriminate against individuals solely because of their age; its stated purpose was to "promote employment of older persons based on their ability rather than age ... [and] to prohibit arbitrary age discrimination in employment." 29 U.S.C. § 621(b). As I indicated earlier, I do not believe that the ADEA directly governs the FAA in its role as a regulator of aviation such as to make it necessary for the FAA to demonstrate that the Age 60 Rule is a bona-fide occupational qualification and therefore acceptable under the Act. But this does not mean that the FAA can ignore the ADEA altogether. The congressional condemnation of age discrimination embodied in the ADEA imposes a duty on the FAA to try to obtain data that might allow it to do away with its current reliance on an arbitrary across-the-board age cutoff as a method of ensuring aviation safety.[6]

III. CONCLUSION

Judges must be ever-vigilant to ensure that when enforcing the APA's requirement of reasoned decisionmaking they defer to agency expertise. The importance of such deference is most acute in regard to safety determinations, given the potential catastrophic effects of inadequate safety

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[6]A rider to the 1996 appropriations bill prohibited the National Transportation Safety Board from expending any funds to study the performance of pilots over 60. *See* Department of Transportation and Related Agencies Appropriations Act of 1997, Pub. L. No. 104-205, § 345, 110 Stat. 2951, 2976 (1996). But this rider was not in effect when the FAA rendered its decision, and thus is irrelevant to a determination of whether the FAA's failure to undertake measures to obtain data on older pilot functioning was reasonable.

regulations, and it is difficult to imagine an agency decision which judges would be more disposed to accept than one that implicates aviation safety. However, deference to agency expertise cannot be allowed to become toleration of arbitrary agency action—or in this case inaction—even in an area as critical as aviation safety. Because I believe the FAA has failed to provide a reasoned explanation for its decision to retain the Age 60 Rule, I would remand to the agency for further proceedings.

APPENDIX B:

FEDERAL REGISTER
Vol. 60, No. 244

Proposed Rules

DEPARTMENT OF TRANSPORTATION (DOT)
Federal Aviation Administration (FAA)

14 CFR Part 121

[Docket No. 27264]
RIN 2120-AF96

The Age 60 Rule

60 FR 65977

DATE: Wednesday, December 20, 1995

ACTION: Disposition of comments and notice of agency decisions.

SUMMARY: This action announces FAA's decisions on a number of issues regarding the FAA's "Age 60 Rule". The issues include: responding to the comments requested in 1993 regarding various aspects of the Age 60 Rule, including the "Age 60 Project, Consolidated Database Experiments, Final Report", and issues raised by pilots seeking exemptions from the Age 60 Rule, issues raised by a petition for rulemaking by the Professional Pilots Federation (PPF), requesting the FAA to remove the Age 60 Rule.

After review of all comments, studies, and other pertinent information, the FAA has determined not to initiate rulemaking to change the Age 60 Rule at this time. The FAA also has decided not to grant any of the pending petitions for exemption or rulemaking.

ADDRESSES: The complete docket containing recent comments on the Age 60 Rule, including copies of studies related to the Age 60 issue, may be examined at the Federal Aviation Administration, Office of the Chief Counsel (AGC-200), Rules Docket, Room 915-G, 800 Independence Avenue SW., Washington, DC 20591, weekdays (except Federal holidays) between 8:30 a.m. and 5:00 p.m.

Availability of Disposition

Any person may obtain a copy of this Disposition by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA-220, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-3484. Requests should be identified by the docket number of this Disposition.

FOR FURTHER INFORMATION CONTACT: Daniel V. Meier, Jr., AFS-240, Regulations Branch, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, Telephone (202) 267-3749 or (202) 267-8086.

SUPPLEMENTARY INFORMATION:

I. Background

Section 121.383(c) of the Federal Aviation Regulations (FAR) (14 CFR § 121.383(c)) prohibits any air carrier from using the services

of any person as a pilot, and prohibits any person from serving as a pilot, on an airplane engaged in operations under part 121 if that person has reached his or her 60th birthday. The FAA adopted the "Age 60 Rule", as it has come to be known, in 1959 (24 FR 9767, December 5, 1959).

In late 1990, the FAA initiated a study aimed at consolidating available accident data and correlating it with the amount of flying by pilots as a function of their age. This resulted in a document entitled "Age 60 Project, Consolidated Database Experiments, Final Report", dated March 1993 (the "Hilton Study"). The FAA held a public meeting and requested comments regarding various issues related to the Age 60 Rule, including the Hilton Study (58 FR 21336, April 20, 1993). The FAA has reviewed the written comments received in the docket (Docket No. 27264) and to the comments presented at the public meeting. The FAA is also responding to a number of pending petitions from pilots seeking an exemption from the Age 60 Rule. Finally, the FAA is responding to a petition for rulemaking submitted by the Professional Pilots Federation (PPF).

This document describes the history and basis for the rule, the major events during the history of the rule, the FAA's response to the issues raised above, and the FAA's rationale for maintaining the Age 60 Rule.

I(a). Basis for the 1959 Rule

The FAA promulgated the Age 60 Rule in 1959 because of concerns that a hazard to safety was presented by utilization of aging pilots in air carrier operations. As noted in that rulemaking, the agency found "that there is a progressive deterioration of certain important physiological and psychological functions with age, that significant medical

defects attributable to this degenerative process occur at an increasing rate as age increases, and that sudden incapacity due to such medical defects becomes more frequent in any group reaching age 60." 24 FR 9767. It also found that "[s]uch incapacity, due primarily to heart attacks and strokes, cannot be predicted accurately as to any specific individual on the basis of presently available scientific tests and criteria." 24 FR 9767. The FAA noted "[o]ther factors, even less susceptible to precise measurement as to their effect but which must be considered in connection with safety in flight, result simply from aging alone and are, with some variations, applicable to all individuals. These relate to loss of ability to perform highly skilled tasks rapidly, to resist fatigue, to maintain physical stamina, to perform effectively in a complex and stressful environment, to apply experience, judgment and reasoning rapidly in new, changing and emergency situations, and to learn new techniques, skills and procedures." 24 FR 9767. While the FAA recognized that such losses generally start well before age 60, the agency determined that beyond age 59 the risks associated with these losses become unacceptable for pilots in part 121 operations.

The agency noted that, due to seniority, older pilots tend to "fly the largest, highest-performance aircraft, carrying the greatest number of passengers over the longest non-stop distances," in the highest density traffic. 24 FR 9767. The FAA concluded that, because of the high risks involved, persons should be precluded from piloting aircraft in part 121 operations after reaching age 60.

While the Age 60 Rule prohibits pilots from operating aircraft under part 121 after reaching their 60th birthdays, it does not impose mandatory retirement for affected pilots. A pilot may work as a flight engineer or flight instructor in operations conducted under part 121 or may work as a pilot in

operations outside of part 121. The pilot also may function as an instructor or evaluator in simulators, an area that has expanded over the years.

I(b). Subsequent Rulemaking Actions

In the early 1980's, the FAA explored possible changes to the Age 60 Rule, stemming from direction from Congress in 1979 that the National Institutes of Health (NIH) study the desirability of mandatory age retirement for certain pilots. (P.L. 96-171). The NIH assigned the National Institute on Aging (NIA) the primary responsibility for implementing the legislation. In the report from this study, "Report of the National Institute on Aging Panel on the Experienced Pilot Study" (August 1981) (NIH report), NIA recommended that the age 60 limit be retained. Among other things, the panel concluded that, while no medical significance could be attached to age 60 as a mandatory retirement age, age-related health changes endanger aviation safety and no medical or performance appraisal system could be identified that would single out pilots who would pose a hazard to safety. The conclusions reached by the NIA panel and the supporting statements contained in the report pointed to an inability to distinguish those persons who, as a consequence of aging, present a threat to air safety from those who do not. The following recommendations were made:

1. The age 60 limit should be retained for pilots in command and first officers.

2. The FAA or some other appropriate Federal agency should be requested to engage in a systematic program to collect the medical and performance data necessary to consider relaxing the age 60 rule.

3. In view of the growing importance of commuter air carriers, the age 60 limit should be extended to cover all pilots engaged in carrying passengers for hire, specifically including operations under part 135 to provide a level of safety equivalent to that provided in part 121 operations.

As part of its study, NIA looked at information on functional decline with age and the increased frequency of a number of medical disorders (including cardiovascular disease, neurological and mental disorders, and changes in perceptual, psychomotor and intellectual functions) associated with aging. In addition, NIA looked at death and disability rates in air carrier pilots and flight engineers, death rates in the general population, and accident rates for pilots.

In response to the NIH recommendations, in 1982 the FAA published an Advance Notice of Proposed Rulemaking (ANPRM) on the Age 60 Rule (47 FR 29782, July 8, 1982). The FAA was considering identifying a select group of pilots who would continue flying in part 121 operations in order to allow the FAA to collect data on selected pilots, age 60 and over, flying in actual operations under part 121. The FAA was also considering establishing age limits for flight engineers serving on airplanes operated under part 121. The FAA withdrew the ANPRM in 1984 (49 FR 14692, April 12, 1984). The FAA found that valid tests did not exist for selecting a group of pilots age 60 and over who could act as the test group for collecting data. The FAA was concerned that without valid selection tests these pilots would create an unacceptable safety risk to part 121 operations. The FAA also stated that it was not appropriate to establish an age limit for flight engineers at that time.

I(c). 1993 Request for Comments on Age 60 Rule and Hilton Study

In late 1990 the FAA contracted for the Hilton Study, a 2-year study to consolidate accident data and correlate it with flying experience and age of pilots. This study analyzed accident data between 1976 and 1988. Although the focus of the study was on part 121 pilots, the study analyzed the accident rates for pilots in part 91, 121, and 135 operations holding Class I, Class II, and Class III medical certificates. The authors of the study found "no hint of an increase in accident rate for pilots of scheduled air carriers as they neared their 60th birthday" but noted that there were no data available on scheduled air carrier pilots beyond age 60. Observing a "hint, and a hint only," of an increase in accident rates for Class III pilots older than 63 years of age, they concluded that "one could cautiously increase the retirement age to age 63."

In addition, on April 20, 1993, the FAA published a notice of public meeting and request for comments regarding various aspects of the Hilton Study. (58 FR 21336; April 20, 1993.) The public meeting was held on September 29 and 30, 1993, and the comment period closed on October 15, 1993. In response to the FAA's notice of public meeting and request for comments, 46 members of the public made presentations at the public meeting, and the FAA received approximately 1,200 written comments on the Hilton Study and the Age 60 Rule in general before the close of the comment period.

I(d). Commuter Rule

The FAA addressed the Age 60 Rule in a Notice of Proposed Rulemaking (Notice 95-5, 60 FR 16230, March 29, 1995) that would require certain commuter operators that now conduct operations under part 135 to conduct those operations

under part 121 (the "Commuter Rule"). In that notice, the FAA proposed to apply all part 121 rules, including the Age 60 Rule, to those pilots currently employed in certain part 135 scheduled operations who would be affected by the Commuter rule. In response to Notice 95-5 the FAA received many comments dealing with the question, not raised by Notice 95-5, of whether there should be an age limitation for part 121 pilots and what that age should be. To that extent those comments have been considered in this Disposition.

I(e). Public Comment

1993 Meeting and Request for Comments

In addition to the comments at the 1993 public meeting and received during the comment period, the FAA received over 2,000 comments after the comment period closed. The issues raised in the comments by both sets of commenters are similar and will be discussed together. The majority of the commenters at the public meeting and those submitting written comments before the close of the comment period are in favor of raising the age limit, while the majority of commenters submitting written comments after the close of the comment period are against raising the age limit. Commenters in favor of raising the age limit offer several different alternatives, ranging from age 62 to no age limit. Some commenters opposed to a rule change state that the age limit should be decreased to age 55.

Commuter Rule

In addition to the above comments, over 2,000 comments on the age 60 issue (including about 1,000 postcards from members of an airline pilot organization) were received in the docket established for the Commuter Rule. The

overwhelming majority of these comments support maintaining the Age 60 Rule and do not express opinions that are different from other comments received in response to the public meeting and request for comments in Docket 27264.

The issues raised at the public meeting, the written comments, and the Commuter Rule are discussed below.

I(f). Professional Pilots Federation Petition for Rulemaking To Repeal the Age 60 Rule

The PPF, an organization whose membership is composed of pilots who oppose the Age 60 Rule, filed a petition for rulemaking in July 1993 (Docket 27375; 58 FR 46585, September 2, 1993) that requests the removal of § 121.383(c). PPF believes that Federal law and policy, operational and regulatory developments since promulgation of the rule, and the results of the Hilton Study warrant the removal.

In its petition, the PPF states that the Age 60 Rule has no basis in fact; refusal to repeal the rule would constitute arbitrary and capricious action by the FAA, contrary to the provisions of the Administrative Procedure Act; refusal to repeal the rule without evidence of a need to retain it in the interest of public safety is inconsistent with Federal policy against age discrimination; and repeal of the rule would have a positive economic impact on the U.S. air carrier industry.

In addition, the PPF states that the FAA should exercise leadership in the international community and repeal the Age 60 Rule; the Age 60 standard in ICAO Annex 1 is ready for change; and the JAA has proposed increasing the maximum age limit for air transport pilots to 65. (The FAA notes that JAA's proposal is to allow pilots to operate in multi-pilot operations

up to the age of 65, provided no more than one pilot in the cockpit is over the age of 60.)

The major issues brought up in the PPF's petition for rulemaking (such as age discrimination, the Hilton Study, economic impacts of the Age 60 Rule, etc.) are discussed below in connection with the disposition of comments in Docket No. 27264. Because the FAA has determined that there is insufficient justification to change the Age 60 Rule at this time and that the rule is consistent with Federal law, PPF's petition for rulemaking will be denied in a separate document.

I(g). Petitions for Exemption From the Age 60 Rule

Over the years the FAA has received numerous petitions for exemption from the Age 60 Rule. The FAA consistently has denied these petitions. Some petitioners have sought review in the United States Courts of Appeals, and the Courts have upheld the denials. However, in 1992 when the Hilton Study was underway, the FAA delayed action on the pending petitions for exemption and those newly received. Most of the issues raised by the petitions were so intertwined with the underlying Age 60 Rule issues, the FAA chose to defer action pending deliberation of the broader issues involving the Age 60 Rule itself. There are currently over 100 petitions for exemption pending. Summaries of the petitions were published in the Federal Register, and comments were received for some of the petitions. These comments expressed opinions and did not provide the FAA with new information. The issues raised by commenters are discussed in sections II, III, and V below.

Overall, the petitioners provide similar information and arguments that they contend justify exemptions. Part of their assertions involve their personal fitness (see section II(a)) and the ability of the FAA to test them individually with simulators

(see section III(a)). They state that they hold or are qualified to hold first-class airman medical certificates (see section III(b)). Some state that they have extensive skill and experience as pilots (see section II(c)). They also note that the FAA gives many exemptions to younger pilots for various medical conditions (see section III(b)).

The petitioners also contend that the Age 60 Rule is discriminatory (see section V(b)). In addition, the petitioners state that the Age 60 Rule is an arbitrary age and that the age of 60 has not scientifically been shown to be an accurate predictor of health or ability (see section II(a)). They state that studies used by the FAA in the past to justify the rule are flawed, including the NIH Study and the reports prepared by Richard Golaszewski (Acumenics Research and Technology, Incorporated, The Influence of Total Flight Time, Recent Flight Time and Age on Pilot Accident Rates, Final Report (1983) (First Golaszewski Report); General Aviation Safety Studies: Preliminary Analysis of Pilot Proficiency (1991) and his subsequent work, Additional Analysis of General Aviation Pilot Proficiency (1993) (Second Golaszewski Report) (section II(b)). They state that pilots at age 60 are in the safest age group and that forcing them to retire results in individuals with less experience serving as pilots, resulting in lower safety (sections II(c) and V(f)). They state that sudden incapacitation is not a cause of accidents in Part 121 operations (section II(a)). They state that the rule was promulgated for economic reasons alone (section V(a)). They state that the rule is contrary to the Age Discrimination in Employment Act (section V(b)). They point out that other countries have higher retirement ages for their pilots (section V(c)). They state that deleting the rule would save the air carriers money (section IV(a)).

Under 49 U.S.C. 44701(e) the FAA, in its discretion, may grant exemptions from the requirements of a regulation if

it finds that such an exemption is in the public interest. Section 11.25 (14 CFR § 11.25) provides procedures for petitioning for an exemption. Section 11.25(b)(5) provides that such a petition must contain any information, views, or arguments available to the petitioner to support the action sought, the reasons why the petition would be in the public interest and, * * * the reason why the exemption would not adversely affect safety or the action to be taken by the petitioner to provide a level of safety equal to that provided by the rule from which the exemption is sought.

The petitioners have the burden of showing that the exemption is justified.

The FAA does not doubt that the petitioners, in general, are well-qualified, experienced, and safe pilots. However, no petitioner has suggested or shown how he or she is unique compared to others who are subject to the rule.

To the extent that petitioners' comments involve the justification for the Age 60 Rule itself, these issues are discussed in sections II, III, and V below.

As to individual petitioners' fitness to serve as pilots past the age of 60, which petitioners assert can be demonstrated by individualized testing or evaluation, no petitioner has submitted a protocol, nor is the FAA aware of a protocol, that would permit the FAA to adequately assess an aging individual's relative risks of incapacitation, either sudden or subtle. They have not shown how their circumstances are different in a significant way from others subject to the rule. For instance, there is nothing unique in petitioners holding first-class airman medical certificates; all pilots who exercise the privileges of an Air Transport Pilot certificate are required to hold a first-class airman medical certificate. Numerous pilots operating under

part 121, who are approaching age 60, have long, distinguished careers. Indeed, the FAA considered these issues in response to the comments in Docket 27264, and they are further responded to below.

The FAA has determined that the petitioners have not shown their circumstances to be unique compared with those who comply with the rule, and that the issues they raise are more appropriately considered in connection with whether the FAA should propose to change the general rule. The FAA will in separate documents deny the pending petitions for exemption from the Age 60 Rule.

In addition, the FAA intends to handle future petitions for exemptions for the Age 60 Rule differently. The normal procedures for handling petitions for exemption are set forth in §§ 11.25 and 11.26. They include publishing a summary of the petition, reviewing any comments received, and issuing an individualized grant or denial of the petition that recites the basis for the petition and the FAA's analysis as to why it is granted or denied. This process can take a substantial amount of time. It appears not to be necessary, however, to carry out all these steps for future petitions for exemption from the Age 60 Rule that are substantially similar to those discussed here. In the future, the FAA will deny any petition for exemption from the Age 60 Rule without first publishing it for comment unless it contains a proposed technique, not discussed in this Disposition, to assess an individual pilot's abilities and risks of subtle and sudden incapacitation. Petitions that do not contain new information or a protocol that may allow the FAA to accurately assess the individual will be summarily denied. A copy of this disposition will be attached to the denial to explain the basis for the FAA's denial. Any petition that does contain such a proposal will be processed and evaluated as provided in §§ 11.25 and 11.26.

II. Concerns Regarding Aging Pilots

After considering all comments and known studies, FAA concludes that concerns regarding aging pilots and underlying the original rule have not been shown to be invalid or misplaced.

II(a). Physical Degradation with Age

As noted above, the Age 60 Rule was promulgated in 1959 to address the progressive deterioration of physiological and psychological functions with age and an increasing occurrence of significant medical defects and sudden incapacitation associated with this degenerative process. While emphasizing heart attacks and strokes, the agency also noted "other" factors, less susceptible to precise measurement, resulting from aging alone. Major emphasis was placed on the difficulties in attempting to predict incapacity.

Several commenters state that the death rate in general and the cardiovascular death rate in particular for men in the relevant age groups declined dramatically between 1960 and 1989. The commenters believe, therefore, that the age limit could be raised. Other commenters, however, state that insurance statistics show a dramatic rise in cardiovascular disease in people over age 50.

In the 35 years since the rule was introduced, there has been remarkable progress in medicine, particularly in the ability to evaluate cardiovascular fitness and in the diagnosis and treatment of cardiac and cerebrovascular illness. For example, cardiovascular disease rises with age, steeply, beginning between ages 55 and 65, and, though mortality has dropped since 1960, cardiovascular disease remains the most frequent cause of death in pilots and the general population. With this

increased incidence of cardiovascular disease in the older population, the risk for unexpected threatening events is raised. Cardiac events (e.g., heart attacks, sudden death) during flight have continued to occur in low but fairly consistent numbers over the years and have caused general aviation accidents.

Other conditions are known to increase in incidence or to become more complicated with aging. Many present greater difficulties of detection and risk assessment than does cardiovascular disease. Among these are cerebrovascular disease; malignancies; endocrine dysfunction; neurological disorders; psychiatric diagnoses including depression; and decline in sensory and motor capabilities. There has been an increasing awareness of the more subtle adverse conditions affecting performance, those related to cognitive functioning.

The concepts of "age-related cognitive decline" or "age-associated memory impairment" describe objective impairment of cognitive function (e.g., attention; language; some visuospatial skills; and, particularly, memory), as a result of aging. These concepts are applied to describe a longitudinal decline in performance that is age appropriate, i.e., a normal outcome of aging (Petersen, RC; Normal Aging, Mild Cognitive Impairment, and Early Alzheimer's Disease; The Neurologist; 1:000-000, 1995 [in press]). Since there now is general agreement that a functional decline occurs with normal aging, on-going research seeks tools for its identification and quantification and to determine its significance for individuals. A condition of "mild cognitive impairment" also is recognized and appears to be the herald of degenerative disease or dementia. Again, research looks for diagnostic tools and for predictor variables of the ultimate outcome for the individual.

Dementia in the adult population is a major and growing medical and social problem. It occurs at all ages, but its

incidence increases with advancing age so that the largest group of demented patients is in the older age groups (Differential Diagnosis of Dementing Diseases; National Institutes of Health Consensus Conference Statement; Volume 6, Number 11; July 6-8, 1987). One in 10 persons over age 65 and nearly half of those over 85 have Alzheimer's disease alone, and increasingly it is found in people in their 40's and 50's.

Many of the dementing diseases can be confirmed or denied with certainty only at autopsy. The history includes a decline from the individual's previously attained intellectual level and usually involves defects in memory, other cognitive capacities, and adaptive behavior. Usually, it is marked by significant deterioration of memory and of one or more other intellectual functions such as language, spatial or temporal orientation, judgment, and abstract thought. Onset is usually but not always insidious, and the patient may or may not be aware of the dementia. Deterioration may vary from subtle changes that are overlooked by coworkers, family, and friends, to totally incapacitating.

Is there a level of cognitive dysfunction acceptable in a part 121 pilot? On a particular basis, can pilots be screened for mild cognitive deficits or for the "normal" age-related cognitive decline? Can early dementia be identified before the affected pilot becomes a risk? How do we know when the pilot becomes a risk? How specifically are the deficits identified through currently available neuropsychological testing related to performance and to the real requirements of piloting? What is an acceptable level of risk in aviation? When does the incidence of cognitive deficit become unacceptable? Are current proficiency evaluations adequate for determination of a pilot's ability to perform adequately under every reasonably anticipated circumstance regardless of age? At present, adequate answers to these questions have not been provided.

In its 1981 report, the Institute of Medicine (IOM) of the National Academy of Science (on which the NIH report is based) noted that in addition to the increased incidence of cardiovascular disease and degradation in cognitive functions associated with aging, other effects of aging become more prevalent. For example, diabetes, thyroid disease, pulmonary dysfunction, and gastrointestinal malignancy are more common with advancing age.

There is other deterioration with age. For instance, research points to a decline with age in the speed and/or quality of many aspects of perceptual and motor functioning. In the general population, the ability to see fine details declines slightly in adulthood until about 60, and more markedly thereafter. With age, there is typically some loss in ability to hear effectively; the higher the frequency beyond about 1,000 hertz, the greater the loss.

Clearly, there is progressive anatomic, physiological, and cognitive decline associated with aging, albeit variable in severity and onset among individuals. Physicians, psychologists, physiologists, and scientists of other disciplines have identified many age-associated variables, some easily measurable, some not, that may be important to human function. There may be other variables, not yet identified, that play an equally significant role. We know that, at some age, everyone reaches a level of infirmity or unreliability that is unacceptable in a pilot in air transportation. That age will vary from person to person but cannot yet be predicted in a specific individual. Because it is unacceptable for these pilots to work until failure or until there is obvious impairment, the age of 60 has served well as a regulatory limit since 1959. Many commenters state that the Age 60 Rule is arbitrary and there is no scientific basis for it. Others would choose a different arbitrary age. For instance, the Acting Chief, Adult Psychological Development, Behavioral and

Social Research Program, NIA, submitted a comment in 1993 on behalf of the NIA. He states the view that the age limit could be increased "to an age closer to the mid-sixties." However, the studies he cites do not point to an age closer to the mid-sixties any more definitively than they point to the age of 60 as an appropriate age limit.

While science does not dictate the age of 60, that age is within the age range during which sharp increases in disease mortality and morbidity occur.

II(b). Hilton Study and Other Accident Rate Studies

Over the years, several reports have examined the rate of accidents as they relate to age in various populations groups, in an effort to better understand how aging may affect safety. As discussed above, the Hilton Study was initiated by the FAA to look at accident rates in pilots. Many commenters state that the report provides justification for a rule change. They point out that the report shows the same accident rate for pilots who are 50 and pilots who are 65. They state that the report finds that accident rates of part 121 pilots decrease with age. Some other commenters, however, state that the report does not provide justification for a rule change. They state that the report is not meaningful since correlating accident rates solely with total flying hours and recent flying hours is not a valid measurement. They also state that it is not meaningful to compare private pilots who fly beyond age 60 with pilots who fly a lot of hours per year in part 121 operations.

David Michaels, Ph.D., MPH, Associate Professor of Epidemiology, The City University of New York Medical School, submitted comments on the Hilton Study. He points out that accident rates are a very crude tool to examine the relationship between pilot age, health, and performance. The

IOM, he notes, "recognized the existence of a fundamental problem: since there are no Class I pilots flying Part 121 flights beyond age 60, there are no medical, performance or even accident data on the group of greatest interest. Needed are data on vision, reaction time, judgment, circadian rhythm and many other neurobehavioral and physiological measures." This problem led to the IOM's recommendation that extensive additional data be collected and analyzed to better understand the relationship of aging and pilot performance. Dr. Michaels notes that the Hilton Study did not take the approach recommended by the IOM. Rather than examining the neurobehavioral and physiological measures detailed by the IOM, the authors of the Hilton Study examined only accident rates. (However, the authors of the Hilton Report fully carried out the work statement of their research contract with the agency which asked only that accidents be studied.)

Dr. Michaels further noted that numerous studies have demonstrated that, among various groups of pilots examined, increasing accident risk is associated with increasing age. He includes papers by Golaszewski (1983); Mortimer (1991); and an analysis by the Office of Technology Assessment (1990) which support this finding. He also invites attention to the citation by the NIA Report of studies by Harper (1964); Lategola, et al (1970); Rohde and Ross (1966); and Booze (1977), all demonstrating increasing risk with increasing age. Dr. Michaels warns that it would be contrary to customary epidemiologic practice to accept unconditionally and definitively findings from a single study that are substantially different from those of previous studies.

There is contention regarding the Hilton Study's grouping of pilots for comparison purposes. Richard Golaszewski, the author of two papers on the relationship between pilot age and accident rates, belives that the Hilton

Study's conclusions are based on the use of a group of pilots (holders of Class III medical certificates who have more than 500 hours of total flight time and 50 hours of flight time in the last year), inappropriate for inferences about the likely accident rate performance of airline pilots of age 60 and above. He believes this group is least like airline pilots and suggests his own alternative: Professional pilots who did not fly for airlines but who held Class I or II medical certificates. Mr. Golaszewski cites the Second Golaszewski Report for conclusions opposite to the Hilton Study-increases in accident rates with age for professional pilots.

The Hilton Study provides a discussion of the First Golaszewski Report, noting those researchers' disagreement with Mr. Golaszewski's methodology and questioning his conclusions. The study also notes methodological concerns regarding the cited works by the Office of Technology Assessment; Mortimer; and Guide and Gibson (1991).

Dr. Michaels concludes that (1) the Hilton Study does not present convincing evidence that pilots holding Class I medical certificates past the age of 60 are not at increased risk of accidents, and (2) that the study is a methodologically invalid foundation for rulemaking. He suggests that the analyses performed are not valid because of the small size of the study (very few accidents and a very large number of flight hours), because the study is insensitive to the real concerns (whether aging is associated with increased risk for incapacitation), and because the study does not have well-documented exposure data. The later refers the fact that the Hilton Study calculated accident rates by comparing the total hours flown. However, because most accidents occur during take offs and landings, Dr. Michaels states that hours flown is not a useful measure in calculating the risk of accidents. He believes that the methods

used in the Hilton Study would obscure any increased rate of accidents among older pilots in the analyses presented.

The First Golaszewski Report concluded that pilots with Class I medical certificates (required for part 121 air carrier pilots in command) and Class II medical certificates (required for other commercial pilots) had a substantially higher accident rate after age 60 than at younger ages. This report was cited by the FAA in denying a petition for exemption from § 121.383(c) submitted by Courtney Y. Bennett et al., and John H. Baker, et al., in 1986. Golaszewski, in the study report itself, noted and resolved to the FAA's satisfaction various sources of potential error and provided rationale for the choices made. Because the study viewed the accident experience of holders of Class III medical certificates (required for non-commercial operations) and of all classes of medical certificate combined rather than that of identified airline pilots, however, and because of disagreement with Golaszewski's selection of numerators and denominators for calculating accident rates, the study findings and methodology were disputed by the petitioners in their later legal action in a U.S. Circuit Court of Appeals. Although the court identified limitations in the study, it upheld the FAA's denial of the petition. Baker v. FAA, 917 F.2d 318 (7th Cir. 1990).

The Second Golaszewski Report indicated similar findings. These studies were based on data contained in the National Transportation Safety Board Accident Records Database and the FAA Comprehensive Airman Information System medical database.

It should be noted that increasing accident rates with age is not found just in aviation. The National Research Council (NRC) has found increasing car accident rates with increasing driver age. In a report published in 1988, the NRC concluded

that "older drivers show an involvement in crashes that is more extensive than that of middle-age drivers, * * *" Transportation in an Aging Society, Transportation Research Board, National Research Council, Washington, D.C. 1988. While safely piloting an airplane is more complex than driving an automobile, both require knowledge, quick reflex actions, good judgment, long-and short-term recall, and many other skills and abilities. Accident rate data represent a quantitative compilation of occurrences where skills and abilities were, for one reason or another, inadequate to cope with a specific situation.

Because statistical analysis of over-age-60 pilots in part 121 operations cannot be done (because there are no such pilots) studies must use surrogate data. As has been the case in both the Hilton Study and the Golaszewski reports, such analyses are subject to the criticism that the data used do not reflect reality and, therefore, are flawed. This is even truer with the consideration of accident rate data in car crashes. Unfortunately, accurate counts of all pilots flying in scheduled air carrier operations during a given time period and their age, current and total flight time, and accident experience are not available. Accidents in air carrier operations are, fortunately, rare, and there are other factors (e.g., seniority bidding for routes) that compound the difficulties encountered in developing meaningful statistics regarding the effects of aging. Further, flying by non-part 121 pilots generally involves aircraft, equipment, airports, operational conditions, and operating procedures that are quite different than part 121 operations. Nevertheless, these studies and the efforts of earlier researchers provide a foundation for this current consideration of the issue.

The Hilton Study, the First Golaszewski Report, and the Second Golaszewski Report sought to define the effects of aging on older pilots in terms of accident rates. While conclusions may differ as to the effect of aging on pilots, the

studies are similarly limited by the rule itself since data cannot be gathered on pilots over age 60 operating in part 121 operations. Factors that may have contributed to the contradictory conclusions are that the accident rates for pilots over age 60 can be determined only in operations outside of part 121 and, therefore, may not be fully useful in drawing conclusions about pilot performance in operations conducted under part 121; and grouping the data differently may lead to different conclusions. While we believe the studies all tend to support a regulatory age limit, they provide no consensus as to precisely what that age limit should be.

In the NIH Study, the most comprehensive study yet performed of the issues involved in age-related retirement of airline pilots, the Panel found that "age-related changes in health and performance influence adversely the ability of increasing numbers of individuals to perform as pilots with the highest level of safety and, consequently, endanger the safety of the aviation system as a whole." In response to the question, "What is the effect of aging on the ability of individuals to perform the duties of pilots with the highest level of safety?", the Panel responded, in part, that undoubtedly, the number of individuals experiencing substantial decline in performance does increase with advancing age * * * Variability in performance appears to increase, and average performance to decrease, with increasing age * * * the risk of an accident increases in the later life of a pilot, and * * * such risk probably accelerates with advancing age * * * The duties of pilots embrace not only maneuvering skill but also decision-making, crew coordination and resource management. Decline in cognitive and psychomotor performance, as well as in physiological performance, occurs with increasing age and will affect how these duties are executed. The health status of the pilot is apt to affect his/her flying performance. In this regard, subtle decrements in performance due to aging processes or subclinical functional

impairment are more likely to pose a problem than is complete failure of performance due to sudden incapacitation.

The Hilton Study has not provided answers to these basic concerns.

After careful deliberation, the FAA has determined that the Hilton Study does not provide an acceptable basis warranting proposing to change the Age 60 Rule. Supporters of both the Hilton Study and the First and Second Golaszewski Reports have good points. The subgroups studied by each is to some extent limited, in that they necessarily do not mirror the subgroup of part 121 pilots to which the Age 60 Rule applies. The studies do not look at pilot performance, indeed, they count all accidents regardless of cause (not just those caused by pilot error), and do not count incidents of pilot incapacitation that did not result in accidents.

Debate surrounding the reliance to be placed on these studies illustrates the difficulty of the task. The changes in accident rates identified in the Hilton Study were small, and its conclusions, therefore, were appropriately cautious. In view of the lack of consensus among the best experts who have looked at this matter, the FAA considers caution appropriate in declining to consider the Hilton Study warranting a change to the Age 60 Rule at this time.

II(c). Performance

Many commenters assert that older pilots have more experience and better performance capability than younger pilots, while other commenters state that older pilots lose performance ability. First, age does not necessarily imply quantity or quality of experience. Experience is valuable, but it does not offset all risks or decrements associated with aging.

Also, at some point, the law of diminishing returns comes into play. Once a pilot achieves a certain level of expertise, additional flight time will not significantly improve pilot performance.

It must also be pointed out that reference to "younger" pilots may be misleading in this context. It is the FAA's experience in the industry that retiring age 60 pilots (who generally are captains) are not replaced by very young and inexperienced pilots. Rather, they are replaced by pilots who have substantial experience as pilots in the first officer position, and often as flight engineers before that.

In addition, some commenters state that pilots near age 60 have performed heroically, proving that performance does not degrade with age and experience, while other commenters state that courageous performances by pilots who were near age 60 are not reasons for abandoning the rule. While the FAA recognizes that certain older pilots have performed heroically in specific circumstances, the decision to change the Age 60 Rule cannot be based on isolated commendable acts. The FAA must make a decision on whether change to the rule is called for based on the totality of evidence available on the safety implications of aging.

II(d). Health and Technology

Many commenters state that since the rule was issued medical technology has advanced and life expectancy has increased; hence, they conclude, the rule is obsolete. In addition, they reference that medical technology is now more capable of screening out pilots with medical risks and that fatigue is no longer an issue due to more modern aircraft that reduce workload and stress levels. Many commenters also state that the aging process can vary markedly among individuals and

that some individuals are in worse physical or mental condition at age 40 than others are at age 60. Hence, these commenters do not believe that age should be a means for determining capability. Many other commenters, however, state that older pilots are not in good physical shape and improvements in medical screening do not detect the subtle impairments with age that can undermine the margin of safety.

As noted earlier, the incidence of cardiovascular disease rises with age, and it remains that most frequent cause of death in pilots and the general population. Though the FAA relies on sophisticated medical assessment and monitoring to permit the certification of carefully selected pilots with known heart disease, the need for the highest level of safety in air carrier operations has required that the increasing, unpredictable danger associated with aging be limited.

In addition, there has been an increasing awareness of the more subtle adverse conditions affecting performance, those related to cognitive functioning. Current medical certification procedures identify those individuals who are at most risk and are adequate for assessing many medical problems in pilots. The significance of the known as well as the potential unknown or unmeasurable adverse factors increases with aging, however, and reduces confidence in the sensitivity of the medical certification process. The Age 60 Rule recognizes this reduction of sensitivity in the context of the statutory recognition that the highest possible degree of safety is required in air carrier operations. As both the incidence of incapacitation risk factors and other adverse effects increase with age, the Age 60 Rule provides additional confidence in air transportation safety.

II(e). Multicrew Concept

Some commenters point out that operations under part 121 use 2-pilot crews, and some also have a flight engineer on board. They state that if one pilot becomes incapacitated, the other crew member(s) can take over. The FAA agrees that the multicrew concept provides an additional measure of safety. Indeed, redundancy in safety features is an important part of the overall safety benefits in part 121 operations, including not only pilots but also other personnel, aircraft structures, and procedures. The safety benefits of redundancy would be reduced, however, if the level of safety of any of the elements were to degrade. The sudden incapacitation of a pilot is not without risk even in a multiple-member crew and is to be avoided. Of equal concern is the prospect of subtle degradation in the judgment, cognitive function, and crew coordination that may accompany advancing age. Unlike the case of sudden incapacitation, such degradation may not be readily apparent to the other crew, and it may be difficult for the crew to deal with the results.

The FAA does not consider the fact that part 121 operations have multiple pilots to be a basis for permitting one (or both) of those pilots to be at unacceptable risk for age-related problems.

III. Alternatives to an Age Limitation

III(a). Performance Checks

Some commenters suggested that the FAA can do performance checks for pilots past age 60 in simulators to ensure that they meet the performance standards. Periodic proficiency and competency checks are intended to detect a pilot's performance deficiency and to correct those deficiencies before the pilot is returned to flight operations. These checks only verify the state of a pilot's performance at the time of the

checks. They are not useful for detection of early or subclinical cognitive defects that may subtly degrade performance or which, in time, may progress to risks for errors in judgment or other actions that may jeopardize safety. The checks do not predict whether an individual pilot's performance will degrade at any time in the future as a result of age. In addition, in its 1981 report, NIA noted that proficiency checks and simulator checks usually are designed to train pilots to meet standards of proficiency under optimal testing conditions using known routines and maneuvers. Although the proficiency checks suffice for pilot performance purposes, they are not suitable for testing complex cognitive functions under actual conditions, such as fatigue and stress; nor are they used to determine at what rate the skills learned in the training sessions decline between two consecutive checks. Standard maneuvers used in proficiency tests are inappropriate for measuring any but obvious decrements in pilot performance. Their inadequacy stems from the fact that the maneuvers are well-known in advance; they may be well-practiced and over-learned by experienced pilots; and they may give no indication of the pilot's ability to perform them under particular levels of stress, fatigue, or unexpected decision-making requirements. Furthermore, the pass/fail nature of the testing program; the probable wide variability among testers; and the train-to-proficiency nature of these tests make them inadequate as a screening mechanism.

III(b). Class I Medical Certificates and Special Issuance Certificates

Some commenters state that part 121 pilots are required to hold FAA medical certificates, and that the medical certification process tests their medical fitness. Commenters also point out that the FAA issues waivers to pilots and permits them to fly with various medical conditions, including

cardiovascular problems. They state that if such pilots can be evaluated, older pilots can too.

The question of operational privileges for aging pilots is not comparable to the question of assessment of younger airmen with specific medical conditions. Although individuals with known medical conditions have been returned to air carrier duties, their circumstances are not comparable with those of an individual who has reached an advanced age. For the person with known disease, the prognosis for the disease can normally be assessed and specific tests or evaluations identified to monitor the condition. Special issuance medical certificates are granted to airmen who have certain known medical conditions or static defects that are disqualifying under the established standards of the Federal Aviation Regulations. This practice does not compromise safety and does not demand similar consideration with respect to the Age 60 Rule. When a special issuance medical certificate is granted, the condition in question has been clearly identified, and the agency has been able to develop a means of assessment and surveillance specially designed to demonstrate the individual's capabilities and to identify any adverse changes. If that is not possible, certification is not granted. Such is not the case in aging, since there are no generally applicable medical tests that can, at this time, adequately determine which individual pilots are subject to incapacitation secondary to either acute cardiovascular or neurological events or to more subtle adverse conditions related to decline of cognitive functioning.

III(c). Suggested Protocol for Gathering Additional Data

One commenter states that data from actual part 121 pilots under 60 and over 60 are needed. The commenter suggested that a pilot group should be established that can fly over age 60. He believes that a cohort of over age 60 pilots can

be identified with a quantifiable five year cardiovascular risk that is lower than the risk in the 50 to 59 year age group. Also this group can be tested by serial performance testing to ensure that there has not been subtle incapacitation. The kind of data that is needed to change the rule could then be collected and analyzed.

The commenter recommends that a consensus working group of experts, appointed by the Federal Air Surgeon, deliver a document that describes a battery of state-of-the-art testing to identify a group of age 60 or older pilots who have the attributes for continued safe flying. A second group of non-flying crew age 60 or older would also be considered. The document would include all testing, follow up, methodology, etc. The Federal Air Surgeon would then review the protocol, obtain additional expert help as needed, and produce the final protocol. Finally, the FAA would choose the sites for participants in the long term surveillance program.

FAA Response: While the FAA appreciates the proposed protocol that the commenter submitted, the FAA does not find it an acceptable basis for initiating a rule change at this time. The FAA's ANPRM in 1982 proposed identification of a select group of aged 60 and over pilots who would continue flying in part 121 operations to permit FAA to collect data. The FAA withdrew the ANPRM in 1984 because valid selection tests for the group did not exist. The FAA was concerned that, without valid selection tests, these pilots would create an unacceptable safety risk in part 121 operations. The commenter does not suggest any data that indicates that a group described would be able to identify any such tests. The FAA has the same concerns today.

IV. Financial Impact of the Age 60 Rule

IV(a). Costs

Some commenters stated that raising the age limit will reduce costs, while other commenters stated that raising the age limit will increase costs.

FAA Response: For the reasons discussed in this Disposition, the FAA has determined that an amendment to the Age 60 Rule should not be proposed at this time. Therefore, the FAA has not evaluated the economic impact of a proposed change.

IV(b). Hiring of Pilots

Some commenters state that increasing the age limit would result in the hiring of fewer new pilots, while others state that there would be no change in hiring and no increase in furloughs because economic success rather than retirements determines hiring and furloughs. Commenters estimate that between 10 and 50 percent of pilots would continue to fly if the age limit is extended.

FAA Response: The FAA believes that the primary determinant of new pilot hiring and furlough is general economic conditions rather than retirements. The effects of increasing the age of mandatory retirement would depend on the number of pilots opting to delay their retirement, which may vary considerably among air carriers. Pilots with long tenures at a single carrier would be less inclined to delay their retirement than pilots who began their service at a relatively late age and may not have sufficient years of service at their present employer to qualify for full vesting in pension plans. In addition, the hiring and furlough plans of those air carriers that permit pilots over age 60 to serve as flight engineers would be less affected. Any effects on furlough and new hires would be

temporary as retirements would not be delayed by more than the difference between the existing and the amended mandatory retirement age.

V. Other Comments

V(a). Original Promulgation of Age 60 Rule

Several commenters contend that the Age 60 Rule was promulgated for economic reasons in response to an improper personal request from the chairman of American Airlines to the Administrator of the FAA and question the FAA's recent actions in reviewing the rule.

FAA Response: When the Age 60 Rule was first promulgated in 1959, the FAA followed standard rulemaking procedures. Notices were published in the Federal Register (draft releases 59-4, 5, and 6, 24 FR 5249, 5248, and 5247, June 27, 1959), the public was given an opportunity to comment on the proposal, and then the final rule was issued. The rule was not issued to facilitate the operations of any air carrier. The rule was promulgated in order to maintain a high level of safety in part 121 operations, and that remains the FAA objective at the present time.

V(b). Age Discrimination

Many commenters state that the current rule discriminates against pilots 60 years of age or older and that the Age 60 Rule is not in compliance with the Age Discrimination in Employment Act. In addition, many commenters state that the original establishment of the age 60 limit discriminated against people 60 years and older. However, many commenters who are opposed to changing the rule state that since pilots

knew about the age 60 limit when they were hired, it is not discriminatory.

FAA Response: The FAA agrees that limitations based on age are to be avoided if possible. However, safety in air transportation is paramount. As discussed above, the FAA has not found a way to acceptably evaluate the inevitable deterioration that occurs with age. Considering that the consequences of a pilot's subtle or sudden incapacitation potentially are so severe, the FAA has determined that at this time safety requires the Age 60 Rule to remain unchanged.

The Equal Opportunity Employment Commission suggests that the FAA use special testing or screening to identify those pilots over age 60 who should be required to stop serving in part 121 operations. They note that some employers of pilots in non-part 121 operations have resolved age discrimination litigation by agreeing to use such additional testing to develop data about pilots' health. However, the FAA has not been apprised of the testing protocols or of the results of any such testing, has not seen them discussed in the medical literature, and has not been party to the agreements. Accordingly, these are not a basis to determine that such testing can be used instead of an age limitation.

V(c). Foreign Pilots Over Age 60

Many commenters reference ICAO standards, the JAA proposal, and the foreign countries that permit pilots to be over age 60, with varying restrictions. In addition, many commenters point out that the FAA allows foreign carriers to operate in U.S. airspace and airports with over age 60 pilots and questioned why U.S. pilots over 60 can't operate in U.S. airspace and airports.

FAA Response: Following the FAA's promulgation of the Age 60 Rule, the International Civil Aviation Organization (ICAO) adopted changes to international safety standards that established an age limit of 60 for the pilot in command of large transport aircraft operating in international air transport service. ICAO standards do not limit the age of the second in command, although an age limit of 60 is recommended. In October 1994, a working group of ICAO's Air Navigation Commission prepared a working paper on the upper age limits for flight crewmembers. The group, acknowledging the lack of medical statistical information, recommended that the age limit not be changed. Some countries such as France and Germany have an Age 60 Rule similar to the United States, while other countries such as the United Kingdom and Switzerland have adopted rules that allow pilots to fly after their 60th birthdays. If foreign airlines operate in the U.S., the FAA requires that the carrier adhere to the ICAO standard. In addition, the Joint Aviation Authorities (JAA) in Europe has proposed to harmonize the European rule to allow pilots who have not reached the age of 65 to operate in multi-pilot operations, provided no more than one pilot in the cockpit is over the age of 60. (JAR-FCL 2-1.11.)

Accordingly, not all countries have dealt with the issue of age limitations in the same manner, and for the reasons discussed elsewhere in this Disposition, the FAA has determined that the Age 60 Rule should be maintained in the United States.

V(d). Inconsistency With Other Regulations

Many commenters point out that pilots who operate under other than part 121 can fly after reaching age 60. They believe, therefore, that there should not be an age limit in part 121 operations.

FAA Response: The Age 60 Rule, like many other safety rules that apply to part 121 operations and not others, provides an increased level of safety appropriate to the operations conducted under part 121. The Commuter Rule proposal, as discussed above, looked at enhancing the level of safety for certain operations now under part 135. The FAA proposed one age limit on all pilots employed in part 121 operations, including those pilots currently employed in the part 135 operations covered by the proposal (60 FR 16230; March 29, 1995). The final Commuter Rule is being issued concurrently with this Disposition.

The FAA's statute requires the Administrator to give consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest and to make rules appropriate to the differences between air transportation and other air commerce. The Age 60 Rule is responsive to this mandate.

V(e). Pilot Union Membership

Many commenters state that pilot unions and employers may favor retirement at age 60 and write this into their labor contracts, but pilots who do not belong to th[illegible] unions should not be penalized by actions that benefit union members. In addition, commenters state that some union members disagree with their union's position and they question their union's motivation for changing their position on the question of raising the age limit.

FAA Response: The Age 60 Rule is a safety rule that must apply to all pilots, regardless of union membership or labor contracts. The FAA cannot speculate as to the basis for union or management positions.

V(f). Experienced Pilot Shortages

Many commenters state that new pilots have a shorter time for gaining experience as second and first officer because of the rapid expansion of the major carriers and the increasing numbers of two-person cockpits. The commenters state that carriers that allow rapid promotion to Captain have poor safety records. Commenters also point out that industry forecasts project a shortage of pilots between 1995 and 2010 due to sharply reduced military pilot training, thus the airlines' most experienced pilots should be retained.

FAA Response: The FAA has not been apprised of data that shows that the Age 60 Rule will create a shortage of experienced pilots and thereby compromise safety.

VI. Conclusion

While the FAA considered each comment in its evaluation of the Age 60 Rule, for the most part the comments made assertions and expressed opinions but did not provide the FAA with additional facts or analysis sufficient to support changing the rule. The FAA's overriding regulatory concern is safety. Before issuing a regulation, the FAA must be satisfied that it will maintain or raise the current level of safety.

The Civil Aviation Medical Association's (CAMA) comments are particularly relevant. CAMA noted that medical conditions are degraded by age and that the aging process accelerates with time. It took a neutral position as to the Age 60 Rule, however, stating that the basic question is one of public policy and determining how much risk is acceptable.

The only things that are clear from review of all of the comments and relevant literature is that there is no one obviously "right answer" discovered through scientific or medical studies, and, as CAMA states, the basic question is one of public policy and determining how much risk is acceptable. The FAA must evaluate all the varied evidence that indicates what those risks are, and determine where the public interest lies. At this time, the FAA cannot be assured that raising the age 60 limit will maintain or raise the level of safety that the Age 60 Rule offers.

Although the Hilton Study provides useful information on accident rates for pilots as a function of their age, it does not provide a satisfactory basis for changing the Age 60 Rule.

Therefore, after carefully considering the written comments submitted to the docket, the comments presented at the public meeting, and analysis of the Hilton Study, the FAA has determined for the reasons stated above that no change to the Age 60 Rule should be proposed at this time.

Issued in Washington, DC on December 11, 1995.

William J. White,

Acting Director, Flight Standards Service.

APPENDIX C:

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-1604 September Term, 1997

Professional Pilots Federation, et al.,
Petitioners

v.

Federal Aviation Adminstration,
Respondent

UNITED STATES
COURT OF APPEALS FOR
THE
DISTRICT OF COLUMBIA
CIRCUIT
FILED NOV 5 1997
CLERK

Consolidated with 96-1025, 96-1026

BEFORE: Wald, Ginsburg and Randolph, Circuit Judges

ORDER

Upon consideration of petitioners petition for rehearing filed August 29, 1997, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: s/ Robert A. Bonner
Deputy Clerk

Circuit Judge Wald would grant the petition.

APPENDIX D:
STATUTES AND RULES INVOLVED

Administrative Procedure Act, 5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

***

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations or short of statutory right;
(D) without observance of procedure required by law;

***

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Age Discrimination in Employment Act, 29 U.S.C. § 623

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age;

***

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization --

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or where the differentiation is based on reasonable factors other than age. . . .

***

The Federal Aviation Act of 1958
(As amended and reenacted into positive law in codified form, Pub. L. 103-272, 108 Stat. 745 (1994))

§44701. General requirements

(a) Promoting safety—The Administrator of the Federal Aviation Administration shall promote safe flight of civil aircraft in air commerce by prescribing—

***

(4) regulations in the interest of safety for the maximum hours or periods of service of airmen and other employees of air carriers; and

(5) regulations and minimum standards for other practices, methods, and procedure the Administrator finds necessary for safety in air commerce and national security.

***

(c) Reducing and eliminating accidents.—The Administrator shall carry out this chapter in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation. However, the Administrator is not required to give preference either to air transportation or to other air commerce in carrying out this chapter.

(d) Considerations and classification of regulations and standards.—When prescribing a regulation or standard under subsection (a) or (b) of this section or any of sections 44702-44716 of this title, the Administrator shall—

(1) consider—

(A) the duty of an air carrier to provide service with the highest possible degree of safety in the public interest...

***

(e) Exemptions.—The Administrator may grant an exemption from a requirement of a regulation prescribed under subsection (a) or (b) of this section or any of sections 44702-44716 of this title if the Administrator finds the exemption is in the public interest.

§44702. Issuance of certificates

(a) General authority and applications.—The Administrator of the Federal Aviation Administration may issue airman certificates, type certificates, production certificates, airworthiness certificates, air carrier operating certificates, airport operating certificates, air agency certificates, and air navigation facility certificates under this chapter. ***

(b) Considerations.—When issuing a certificate under this chapter, the Administrator shall—

(1) consider—

(A) the duty of an air carrier to provide service with the highest possible degree of safety in the public interest; and

(B) differences between air transportation and other air commerce; and

(2) classify a certificate according to the differences between air transportation and other air commerce.

The Age 60 Rule, 14 C.F.R. § 121.383(c)

(c) No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.

EEOC Regulations, 29 C.F.R. § 1625.6

(a) Whether occupational qualifications will be deemed to be "bona fide" to a specific job and "reasonably necessary to the normal operation of the particular business," will be determined on the basis of all the pertinent facts surrounding each particular situation It is anticipated that this concept of a bona fide occupational qualification will have limited scope and application. Further, as this is an exception to the Act, it must be narrowly construed.

(b) An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.

(c) Many state and local governments have enacted laws or administrative regulations which limit employment opportunities based on age. Unless these laws meet the standards for the establishment of a valid bona fide occupational qualification under section 4(f)(1) of the Act, they will be considered in conflict with and effectively superseded by the ADEA.

Supreme Court, U. S.
FILED
APR 6 1998
CLERK

No. 97-1267

In the Supreme Court of the United States

OCTOBER TERM, 1997

PROFESSIONAL PILOTS FEDERATION, ET AL.,
PETITIONERS

v.

FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, limits the Federal Aviation Administration's authority to adopt the "Age 60 Rule," 14 C.F.R. 121.383(c), an air transportation safety standard that prohibits persons sixty years of age or older from serving as pilots of most commercial aircraft.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a1-a39) is reported at 118 F.3d 758. The decision of the Federal Aviation Administration (Pet. App. a40-a76) is published at 60 Fed. Reg. 65,977.

JURISDICTION

The court of appeals entered its judgment on July 15, 1997. A petition for rehearing was denied on November 5, 1997. Pet. App. a77. The petition for a writ of certiorari was filed on February 3, 1998. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has given the Federal Aviation Administration (FAA) broad authority to prescribe "regulations in the interest of safety for the maxi-

mum hours or periods of service of airmen and other employees of air carriers" and to set safety standards for air carriers. 49 U.S.C. 44701(a)(4) and (b)(1). The agency must regulate "in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation." 49 U.S.C. 44701(c). Moreover, when prescribing air safety standards, the FAA must consider "the duty of an air carrier to provide service with the highest possible degree of safety in the public interest." 49 U.S.C. 44701(d)(1)(A).

The "Age 60 Rule," which prohibits air carriers from using, and any person from serving as, a pilot in most commercial operations "if that person has reached his 60th birthday," is a long-standing safety standard. 14 C.F.R. 121.383(c). The FAA promulgated the rule in 1959 because of its concern about the danger to the public if the pilot of a large commercial aircraft were suddenly to become incapacitated. See 24 Fed. Reg. 5248 (1959). In that rulemaking, the agency found "that there is a progressive deterioration of certain important [physiological] and psychological functions with age, that significant medical defects attributable to this degenerative process occur at an increasing rate as age increases, and that sudden incapacity due to such medical defects becomes significantly more frequent in any group reaching age 60." 24 Fed. Reg. 9767 (1959). The agency also found that incidents of sudden incapacity were difficult to predict, and that the ability to perform the type of highly skilled tasks required of pilots was "even less susceptible to precise measurement." *Ibid.*

The FAA therefore determined that the Age 60 Rule, which precludes persons from piloting large

commercial aircraft from that age onward (but not from serving in other positions, such as flight engineer), was necessary to protect the public safety. The rule was challenged immediately and upheld as a reasonable exercise of the FAA's mandate to protect public safety. *Air Line Pilots Ass'n, Int'l* v. *Quesada*, 276 F.2d 892 (2d Cir. 1960).

2. The FAA and others have repeatedly reexamined the rule. In 1979, Congress directed the National Institutes of Health, in consultation with the Secretary of Transportation, to conduct a study of the Age 60 Rule. Act of Dec. 29, 1979, Pub. L. No. 96-171, 93 Stat. 1285. The National Institute on Aging (NIA) was assigned responsibility for the study and issued its report in 1981. Although the NIA found "no convincing medical evidence to support age 60, or any other *specific* age, for mandatory pilot retirement," the NIA acknowledged the "abundant and persuasive evidence that, among pilots as well as others, disease, disability and death rates rise increasingly steeply during each half-decade beyond the age of 50." C.A. App. 159. The report added: "Aircraft accidents attributed to acute or subtle incapacitation from disorders associated with aging have occurred in the United States and elsewhere * * *. The available actuarial and epidemiological data suggest that the probability of such accidents will increase if the age limit is increased." *Id.* at 161. The NIA could not identify, however, any means of singling out those pilots who would pose the greatest hazard. *Id.* at 158, 164.[1] The NIA therefore made three recommenda-

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[1] In *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 315-316 (1976), this Court recognized that "physical ability generally declines with age" and rejected an equal protection

tions: (1) retention of the Age 60 Rule, (2) collection of medical and performance data necessary to consider relaxation of the rule, and (3) extension of the rule to all for-hire passenger operations, as the National Transportation Safety Board (NTSB) had urged. *Id.* at 158.

In response to the NIA report, the FAA issued an advance notice of proposed rulemaking, seeking public input on the recommendation to collect more data on the effects of aging on pilot performance. 47 Fed. Reg. 29,782 (1982). The FAA proposed an eight-year experiment, using a select group of volunteer pilots who would continue flying until age 62 and would be subject to extensive quarterly testing. *Id.* at 29,783-29,784. After considering hundreds of comments, however, the FAA withdrew the proposal. 49 Fed. Reg. 14,692 (1984). Among other things, the agency found no sufficient means to collect performance data, from a statistically valid sample, under conditions of stress and fatigue. *Id.* at 14,693. Nor were there tests "that can adequately determine which individual pilots are subject to incapacitation" due to cardiovascular, cerebrovascular, or other disease. *Ibid.* The FAA therefore withdrew the proposal "because, in the absence of validly selective tests, there are not sufficient means for collecting quantitative medical and performance data on airline pilots over age 60 under conditions of actual operational stress and fatigue that do not introduce an unacceptable safety

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challenge to a State's imposition of a mandatory retirement age for police officers, rather than use of individualized testing. The dissent, as well, noted that at some point "medical examinations lose their predictive ability" and cited the Age 60 Rule favorably in that connection. *Id.* at 326 n.6 (Marshall, J., dissenting).

risk." *Id.* at 14,692. Cf. *Advocates for Highway & Auto Safety* v. *Federal Highway Admin.*, 28 F.3d 1288 (D.C. Cir. 1994) (striking down temporary program, in which waivers of long-standing safety standard were granted to truckers with impaired vision in order to collect data for potential amendment of vision standard).

The FAA has also reviewed the Age 60 Rule on a number of occasions in response to petitions for rulemaking or exemptions. In each instance, the agency concluded that neither repeal of the rule nor an exemption from it was warranted. Without exception, the courts have upheld those determinations. See *O'Donnell* v. *Shaffer*, 491 F.2d 59 (D.C. Cir. 1974); *Starr* v. *FAA*, 589 F.2d 307 (7th Cir. 1978); *Gray* v. *FAA*, 594 F.2d 793 (10th Cir. 1979); *Rombough* v. *FAA*, 594 F.2d 893 (2d Cir. 1979); *Keating* v. *FAA*, 610 F.2d 611 (9th Cir. 1979); *Baker* v. *FAA*, 917 F.2d 318 (7th Cir. 1990), cert. denied, 499 U.S. 936 (1991).[2]

The Age 60 Rule has attracted Congress's attention from time to time as well. For example, Congress held hearings on the rule in 1985, but did not amend or repeal the rule legislatively. See *Age Discrimination and the FAA Age 60 Rule: Hearing Before the House Select Comm. on Aging*, 99th Cong., 1st Sess. (Comm. Pub. No. 533, 1985). Congress has

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[2] In *Aman* v. *FAA*, 856 F.2d 946 (7th Cir. 1988), the court of appeals reviewed several exemption denials. Although it upheld the FAA's conclusion that the petitioners in that case had not shown an effective protocol to screen out all increased risk of incapacitation, it remanded for a more detailed response to petitioners' claim that experience offsets undetected physical losses. *Id.* at 957. After the FAA responded, the matter returned to the court in *Baker*, which upheld the agency's denial of the exemptions.

enacted a provision in the Internal Revenue Code that gives special tax treatment to pilots affected by the rule. 26 U.S.C. 415(b)(9). And recently, Congress prohibited the NTSB from expending any funds to study the performance of pilots over age 60. Department of Transportation and Related Agencies Appropriations Act of 1997, Pub. L. No. 104-205, § 345, 110 Stat. 2976.

3. The FAA's most recent review of the rule began in 1990, when it contracted for a study correlating accident data with pilot age and flying time. The final report, known as the "Hilton Study," was issued in 1993. Although the accident data examined in the Hilton Study revealed "no hint of an increase in accident rate for pilots of scheduled air carriers as they neared their 60th birthday," the study's authors warned that the question whether the retirement age should be increased "must be answered very conservatively because of the possibility of catastrophic results." C.A. App. 144. The study suggested, however, that the retirement age for pilots might "cautiously" be increased to 63. *Id.* at 145.

Soon after the Hilton Study was issued, the FAA invited the public to comment on it and to participate in a meeting to consider increasing the maximum age for pilots and other issues related to the Age 60 Rule. 58 Fed. Reg. 21,336 (1993). During that process, petitioner Professional Pilots Federation submitted a petition for rulemaking, in which it asked the FAA to repeal the Age 60 Rule, and petitioner William T. Reiners, III, requested an exemption. After considering an extensive record, the FAA concluded that the "concerns regarding aging pilots and underlying the original rule have not been shown to be invalid or misplaced." Pet. App. a53. It therefore decided not to

initiate a rulemaking to change or repeal the rule and declined to grant any pending petitions for exemption or rulemaking. *Id.* at a52, a63, a76.

The agency acknowledged that, in the years since the rule was adopted, "there has been remarkable progress in medicine, particularly in the ability to evaluate cardiovascular fitness and in the diagnosis and treatment of cardiac and cerebrovascular illness." Pet. App. a53. Nonetheless, the frequency of cardiovascular disease still rises with age, especially between ages 55 and 65, and remains the most frequent cause of death in pilots and the general population. *Ibid.* Most problematic, however, are age-related impairments of cognitive function (*e.g.*, attention span, language ability, visuospatial skills, memory) and the increasing incidence of dementia, which may be characterized by subtle changes and are more difficult to detect and assess. *Id.* at a54-a57. Given the FAA's statutory mandate to prescribe regulations that will assure "the highest possible degree of safety," 49 U.S.C. 44701(d)(1)(A), and the lack of any proven, effective means of detecting or predicting age-related impairment of cognitive function, the FAA concluded that the Age 60 Rule effectively limits "the increasing, unpredictable danger associated with aging" and "provides additional confidence in air transportation safety." Pet. App. a65.

Addressing comments contending that the rule does not comply with the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, the FAA agreed that "limitations based on age are to be avoided if possible," but stressed that "safety in air transportation is paramount." Pet. App. a72. Given the potentially severe consequences of a pilot's subtle or sudden incapacitation and the current lack

of any acceptable way to screen an individual pilot for age-related risks, the agency concluded that "at this time safety requires the Age 60 Rule to remain unchanged." *Ibid.*

In a companion proceeding concerned with commuter airlines, the FAA extended the Age 60 Rule and other safety standards previously applied only to large commercial airlines to commuter operations, as the NTSB had recommended. The agency found that, because "rules designed to enhance the performance of pilots are among the most valuable in reducing the number of accidents," the Age 60 Rule will provide "an additional measure of safety by reducing the risk that age-related degradation will affect pilot performance." 60 Fed. Reg. 65,832, 65,843 (1995).

4. Petitioners sought judicial review of the FAA's decisions not to commence a rulemaking to repeal the Age 60 Rule and to extend the rule to commuter operations. They argued that the rule is a "direct violation" of the ADEA and is unsupported by the record and therefore arbitrary.

The court of appeals unanimously rejected petitioners' ADEA argument, agreeing with the FAA that, by its terms, the ADEA, 29 U.S.C. 623(a)(1), prohibits only an "employer" from discriminating on the basis of age in employment decisions: "Nothing in the Act can plausibly be read to restrict the FAA from making age a criterion for employment when its [*sic*] acts in its capacity as the guarantor of public safety in the air." Pet. App. a8. The court explained further that, "[i]f the Congress intends to limit the means available to the FAA in its pursuit of air safety, we trust it will say so rather than leave the matter to the courts to infer." *Id.* at a8-a9. Because the ADEA thus does not limit the FAA's authority as a safety regulator, the

court found it unnecessary to decide whether the Age 60 Rule is a "bona fide occupational qualification" (BFOQ) under 29 U.S.C. 623(f)(1). Pet. App. a9; see *id.* at a26.

The court also unanimously agreed that the FAA's decision not to institute a rulemaking to repeal the rule should be reviewed under the usual "arbitrary and capricious" standard of the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A). Pet. App. a10, a26 n.2. The panel majority held that, under that standard, none of petitioners' numerous objections had merit. For example, with respect to petitioners' claim that individualized testing could screen out pilots at risk from age-related impairment, the court stated that the "FAA explained that even state-of-the-art testing cannot screen out potentially risky pilots." *Id.* at a13. To the extent that data not presented to the agency were alleged to contradict that finding, the court reasoned that "the FAA simply cannot be faulted for failing to explain away data that are not part of the record." *Ibid.*

The court also found that the FAA's policy of allowing younger pilots with known medical problems to continue flying, where such conditions can be monitored, does not undermine the Age 60 Rule, because "the subtler forms of physical and mental decline that may accompany aging often cannot be detected, let alone monitored or controlled." Pet. App. a18. The court held further that the FAA's decision to hold for-hire common carriers of passengers and cargo to a higher safety standard than other forms of air commerce (such as corporate aircraft and unscheduled air taxi services) is reasonable and based on distinctions set forth in federal aviation law. *Id.* at a18-a20.

The dissent maintained that the FAA had not "provide[d] a reasoned explanation for its decision to retain the Age 60 Rule." Pet. App. a39. Despite the agency's solicitation and receipt of substantial public input on the matter, the dissent stated that it was "arbitrary" for the FAA to "refus[e] to try and obtain the evidence it claims is necessary to rescind the rule." *Id.* at a35.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Furthermore, the FAA's Age 60 Rule does not conflict with the Age Discrimination in Employment Act of 1967 (ADEA) or the regulations of the Equal Employment Opportunity Commission (EEOC). Accordingly, the petition for a writ of certiorari should be denied.

1. As the court of appeals unanimously held and petitioners concede (Pet. 18), the ADEA, by its terms, proscribes age discrimination only by "an employer." The ADEA therefore does not limit the FAA's authority as safety regulator of the airline industry. 29 U.S.C. 623(a); Pet. App. a8-a9. When Congress intends that civil rights legislation apply to federal agencies in their programmatic activities, it so provides in unmistakable language that is not present in the ADEA. See, *e.g.*, 29 U.S.C. 794(a) ("[n]o otherwise qualified individual" shall be subject to discrimination on the basis of disability "under any program or activity conducted by any Executive agency" of the federal government). "Nothing in the [ADEA] can plausibly be read to restrict the FAA from making age a criterion for employment when [it] acts in its capacity as the guarantor of public safety in the air."

Pet. App. a8. The court of appeals therefore correctly ruled that "[t]he general prohibition of the ADEA, *addressed as it is to employers*, should not be read by mere implication to override the specific grants of authority to the FAA" to regulate air carriers to promote air safety. *Ibid.* (emphasis added).

Contrary to petitioners' claim (Pet. 14), the court of appeals did not depart from the principle of statutory construction that a specific statute generally takes precedence over a more general one. Nor did the court ignore (Pet. 17) the principle that a court should endeavor to give effect to each of two statutes that conflict. Here, the ADEA and federal aviation safety laws are simply addressed to different matters, and the court thus properly concluded that there is no basis for extending the ADEA beyond the particular subject matter to which it is plainly addressed—*i.e.*, age discrimination by "an employer."

2. Petitioners mistakenly argue (Pet. 13-18) that the court of appeals' decision conflicts with *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400 (1985), and relieves an airline employer of the burden of establishing that age is a bona fide occupational qualification (BFOQ), within the meaning of the ADEA and EEOC regulations, for a particular job. Having determined that the ADEA does not apply to the FAA's activities as a safety regulator, the court of appeals correctly found no need to decide whether the Age 60 Rule is a BFOQ. Pet. App. a9, a26. The decision of the court of appeals therefore does not conflict with the EEOC's BFOQ regulation or with *Criswell*, which upheld that regulation.

The ADEA allows age-based discrimination "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the

particular business." 29 U.S.C. 623(f)(1). The EEOC, which has responsibility for enforcing the ADEA, has issued a regulation explaining what "[a]n employer" must show in order to establish a BFOQ defense to a claim of age discrimination. The employer must establish that "(1) the age limit is reasonably necessary to the essence of the business, and either (2) * * * all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) * * * some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age." 29 C.F.R. 1625.6(b). The regulation also provides that, if public safety is a goal, "the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact." *Ibid.*

In *Criswell*, 472 U.S. at 416-423, the Court endorsed the EEOC's regulation, ruling that an employer has the burden of proving that an age limit is a BFOQ reasonably necessary for the conduct of its business, even where there are public safety implications, and that such determinations are to be made on a case-by-case basis. The Court also held that an airline had not established a BFOQ defense for the mandatory retirement age of 60 that the airline—not the FAA—had imposed on its flight engineers. The *Criswell* Court never suggested that the FAA's Age 60 Rule for commercial pilots violates the ADEA or does not constitute a BFOQ. Rather, *Criswell* distinguished the airline's managerial decision to require flight engineers to retire at age 60 from the FAA's mandate that pilots do so, on the ground that "the qualifications for a flight engineer [are] less rigorous than those required for a pilot." *Id.* at 418. The Court

further noted that the FAA's rule was "adopted for safety reasons" (*ibid.*) by the "agency with primary responsibility for maintaining airline safety." *Id.* at 423.

Inasmuch as the court of appeals here did not address whether the Age 60 Rule is a BFOQ, its decision cannot conflict with the EEOC's regulation or *Criswell*. Another court of appeals, however, has recently upheld an air carrier's claim that the Age 60 Rule is a BFOQ under the ADEA and the EEOC's regulation.

In *Coupé* v. *Federal Express Corp.*, 121 F.3d 1022 (6th Cir. 1997), cert. denied, No. 97-1012 (March 23, 1998), a pilot subject to the Age 60 Rule faced the choice of retirement or training for a flight engineer position. The EEOC dismissed his age discrimination complaint, noting that his employer "was acting 'pursuant to Federal Air Regulations.'" *Id.* at 1024. In federal court, the employer defended its action on the ground that the Age 60 Rule is a BFOQ for commercial pilots, and both the district court and court of appeals agreed. The court of appeals found that, although the FAA has never purported to establish the Age 60 Rule as a BFOQ, it "performed the same sort of analysis that a court would undertake in determining the legitimacy of a BFOQ defense under the framework established by the EEOC regulation." *Id.* at 1024-1025. The court then held that "[t]he employer's burden to make a particularized factual showing in support of its BFOQ defense is satisfied by demonstrating the existence of an age-based federal agency rule by which the employer is bound—at least where, as here, the rule has been adopted on grounds that could support a BFOQ defense had the age limit been adopted by the employer voluntarily."

Id. at 1026. The court added that it does not believe that the ADEA requires an employer "to second-guess the very agency established by Congress to regulate it." *Ibid.*

Under the Sixth Circuit's decision, an air carrier can comply with both the FAA's safety-based Age 60 Rule and the ADEA by showing that the rule's retirement age limit for most commercial pilots is a BFOQ. The Age 60 Rule is also consistent with *Criswell*, which recognized that, "[w]hen an employer establishes that a job qualification has been carefully formulated to respond to documented concerns for public safety, it will not be overly burdensome to persuade a trier of fact that the qualification is 'reasonably necessary' to safe operation of the business." 472 U.S. at 419.

3. Petitioners' argument (Pet. 19-22) that the court of appeals applied "an insufficiently rigorous standard of review" to the FAA's decision because that decision assertedly conflicts with the jurisdiction and policies of another federal agency is mistaken. As we have shown, the Age 60 Rule does not conflict with the ADEA or with the EEOC's regulations and jurisdiction. Thus, cases such as *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 173 (1962)—in which the Court cautioned that one federal agency should not "trench upon [an]other's jurisdiction"—are inapposite.[3] In any event, *Burling-*

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[3] Petitioners imply (Pet. 19-20) that the FAA both ignored the ADEA and claimed that it was entitled to deference for its interpretation of that statute. Neither suggestion is correct. First, in announcing its decision not to initiate a rulemaking to repeal the Age 60 Rule, the FAA explicitly addressed petitioners' comments that the rule does not comply with the ADEA. Although the FAA agreed that "limitations based on

ton Truck Lines did not hold that the standard of review prescribed by the Administrative Procedure Act (APA) is superseded when agency action implicates more than one statute. In fact, the Court applied the APA in *Burlington Truck Lines* in holding that the order of the Interstate Commerce Commission could not stand because it contained "no findings and no analysis." *Id.* at 167 & n.15. It is thus not surprising that neither the majority nor the dissent in the court of appeals endorsed petitioners' "heightened standard" (Pet. 20). See Pet. App. a10, a26 n.2.

Under the APA, the court of appeals was obliged to determine if the FAA's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). The court of appeals applied that standard to the FAA's decision not to initiate a rulemaking to repeal the Age 60 Rule and also held that the ADEA does not limit the FAA's authority as a safety regulator. Pet. App. a8-a9. The court thus concluded that the FAA's decision is "in accordance with law."[4]

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age are to be avoided if possible," it also stressed that "safety in air transportation is paramount." Pet. App. a72. The agency explained further that no commenter in the proceeding had provided it with any existing testing protocol that could adequately screen pilots for the risk of subtle or sudden age-related incapacitation. *Ibid.* Second, although the FAA properly argued in the court of appeals that its expertise in matters of aviation safety is entitled to deference, the agency did not seek—and did not receive—deference for its argument that the ADEA does not apply to its safety-based determinations, such as the Age 60 Rule. See Gov't C.A. Br. 21-36; Pet. App. a7-a9.

[4] The court also concluded that the FAA's decision is not arbitrary and capricious because the rule applies to some types of pilots but not to others. Pet. App. a15-a21. Although the issue whether the FAA's decision is arbitrary or capricious is

4. Finally, petitioners err in contending (Pet. 23-26) that the decision of the court of appeals conflicts with the reasoning and outcome of decisions in other circuits. Petitioners concede (Pet. 23) that no court has ever held the Age 60 Rule to be invalid. That should end the matter, because this Court "reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956). Petitioners argue, nonetheless, that the reasoning of the court of appeals differs from that of other courts that have examined the Age 60 Rule in the context of age discrimination claims. They further maintain (Pet. 26) that the "disparate outcomes" in various cases involving age discrimination claims in the aviation industry suggest that more guidance from the Court in this area is necessary. Petitioners are mistaken.

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not "fairly included" in petitioners' "Questions Presented," Sup. Ct. R. 14.1(a), petitioners nonetheless discuss the allegedly inconsistent application of the rule in their petition. Pet. 21-22, 25.

As the court of appeals correctly concluded, the Age 60 Rule is not applied in an arbitrary or inconsistent manner. For example, the rule applies to cargo operations, but not to corporate aircraft, because federal law requires the highest safety standards for for-hire common carrier service to the public, irrespective of whether passengers are transported, and does not impose that requirement for other air transportation. Pet. App. a18-a19. Younger pilots with certain known medical conditions may be permitted to continue flying, provided that the condition can be assessed and monitored adequately; in contrast, "the subtler forms of physical and mental decline that may accompany aging often cannot be detected, let alone monitored or controlled." *Id.* at a18. Finally, the fact that some foreign pilots over age 60 may fly in U.S. airspace is a consequence of other provisions of federal aviation law and the government's treaty obligations. *Id.* at a20-a21.

As petitioners acknowledge (Pet. 10-11), the court of appeals decisions here and in *Coupé* are the first cases in which the FAA's Age 60 Rule has been challenged under the ADEA. As we have explained, the two decisions are fully compatible in both reasoning and outcome. In this case, the court held that the ADEA does not apply to the FAA in its role as safety regulator and, thus, it had no occasion to reach the BFOQ issue. In *Coupé*, the court held that the airline employer established a BFOQ defense by demonstrating that it is bound by the FAA's safety-based Age 60 Rule.

Other decisions cited by petitioners as conflicting with the reasoning and outcome of the decision of the court of appeals in this case did not pass on *the FAA's* Age 60 Rule at all. Rather, at issue in those cases were mandatory age requirements imposed as managerial decisions by the employer, often for jobs other than commercial pilots, the only positions covered by the Age 60 Rule. In *EEOC* v. *Boeing Co.*, 843 F.2d 1213 (9th Cir.), cert. denied, 488 U.S. 889 (1988), for example, an aircraft manufacturer failed at summary judgment to establish that a requirement it imposed on its own corporate pilots to retire at age 60 was a BFOQ. Although the court expressed some reservations about the FAA's Age 60 Rule in *dicta*, it acknowledged that the statutory standard underlying the rule "requires 'the highest possible degree of safety in the public interest' * * * and may be more hospitable to discrimination in the interests of safety than ADEA's standard for a BFOQ." *Id.* at 1220. The court also found that some of the tasks performed by corporate pilots are not as stressful and do not pose "as grave a safety risk" as the responsibilities of commercial pilots. *Id.* at 1221.

In *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985), the Court held that an airline's job transfer policy, which provided fewer "bumping" rights to pilots removed from their positions due to the Age 60 Rule than to pilots removed for other reasons, violated the ADEA. Because the Age 60 Rule itself was not challenged, however, the Court expressed no view on its lawfulness, noting only that the EEOC had not endorsed it as a BFOQ. *Id.* at 123 & n.17.

The fact that there have been different outcomes in cases involving different job categories and different employer-imposed age limitations is not particularly surprising. Compare, *e.g.*, *Williams* v. *Hughes Helicopters, Inc.*, 806 F.2d 1387 (9th Cir. 1986) (affirming jury verdict that upheld employer's age-based "stop flying" policy as a BFOQ for helicopter pilots) with *Tuohy* v. *Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982) (reversing summary judgment ruling that employer's mandatory retirement age for corporate pilots was a BFOQ). Cf. also *EEOC* v. *American Airlines, Inc.*, 48 F.3d 164 (5th Cir. 1995) (upholding, based on collateral estoppel, ruling that airline's policy against hiring flight officers too old to reach the rank of captain before age 60 is a BFOQ). Those decisions are not irreconcilable. More important, they have no bearing on the legal issue presented by this case—whether the ADEA limits the FAA in its role as safety regulator—a matter on which there is no conflict in the courts.

Finally, there is no conflict between the decision of the court of appeals here and the decisions in *Baker* v. *FAA*, 917 F.2d 318 (7th Cir. 1990), cert. denied, 499 U.S. 936 (1991), and *Aman* v. *FAA*, 856 F.2d 946 (7th Cir. 1988). Neither *Baker* nor *Aman*, which ruled on challenges to the FAA's denial of exemptions from

the Age 60 Rule, involved an ADEA claim. In any event, as explained in note 2, *supra*, the court in *Aman*, 856 F.2d at 954, found that "substantial evidence supported the FAA's conclusions" that no effective test existed to eliminate all incremental risk of "sudden incapacitation or undetected deterioration of skills among pilots over sixty." The court remanded to the FAA, however, for further consideration of the claim that "older pilots' edge in experience offsets any undetected physical losses." *Id.* at 957.

On remand, the FAA again denied the requested exemptions from the Age 60 Rule, and the matter returned to the court of appeals in *Baker*. Although the court of appeals was critical of the evidence presented by both sides, the court concluded that the FAA's decision was supported by substantial evidence and upheld the denial of the exemptions. 917 F.2d at 319-323. The court acknowledged that "crucial issues of public safety are at stake," but encouraged the FAA to continue to study the matter. *Id.* at 322. The FAA did precisely that, in commissioning the Hilton Study and examining all aspects of the Age 60 Rule in the 1995 proceeding that led to the decision in this case. Thus, *Aman* and *Baker* in no way conflict with the decision of the court of appeals here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The
Supreme Court of the United States
October Term, 1997

PROFESSIONAL PILOTS FEDERATION,
WILLIAM T. REINERS, III, PHILIP T. SHAW,

Petitioners

v

FEDERAL AVIATION ADMINISTRATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In The

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PROFESSIONAL PILOTS FEDERATION, WILLIAM T. REINERS, III, PHILLIP T. SHAW,

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v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In the petition for certiorari, petitioners urged that the decision of the D.C. Circuit sustaining the Federal Aviation Administration's extension and reaffirmation of an age-based prohibition on employment for airline pilots should be reviewed by this Court because: (1) The rule is in conflict with a federal statute and a leading decision of this Court interpreting that statute; (2) the D.C. Circuit's approval of the agency's action under an "arbitrary and capricious" standard of review was improper in light of the rule's infringement of congressional civil rights policies; (3) the decision created a conflict with the

reasoning and outcome of decisions in the Sixth, Seventh, and Ninth Circuits. The theme underlying these issues is not unique to the FAA or to aviation. Under the reasoning of the decision below any federal agency may contravene the policy of Congress, the courts, and other federal agencies so long as it gives some explanation, however illogical, and justifies its audacity in the name of a "paramount" goal such as safety or public welfare.

The FAA, in response, defines the issue not as one of whether the FAA is obligated to comply with an act of Congress, but of whether the ADEA "limits the Federal Aviation Administration's authority to adopt ... an air transportation safety standard." Opp. at I. The FAA urges that there is no conflict between the ADEA and the Age 60 Rule because the ADEA and the FAA's governing statute are "addressed to different matters." Opp. at 11. It discerns no tension between the D.C. Circuit's deferential standard of review and the APA requirement for judicial scrutiny of agency actions that are in excess of statutory jurisdiction. Opp. at 15. It finds no conflict between the decision here and the decisions in the Sixth, Seventh, and Ninth Circuits that expressed divergent views on the application, soundness, and legitimacy of the Age 60 Rule. Opp. at 16.

These conclusions follow from the FAA's assumption that its authority to regulate air safety may be exercised without regard for the effect on the civil rights of pilots or the policy of the EEOC. We reply to the FAA's contentions here.

I.
THE CONFLICT WITH THE ADEA, EEOC REGULATIONS, AND THE *CRISWELL* CASE IS MANIFEST.

The ADEA prohibits employers from discharging an employee "because of such individual's age," 29 U.S.C. §623(a)(1), while the Age 60 Rule forbids a Part 121 airline employer to "use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday." 14 C.F.R. §121.383(c). Since the statute prohibits age-based discharge and the regulation requires it, petitioners view the FAA's regulation to be in conflict with the ADEA. What is arbitrary about the rule is that it is not a licensing requirement to operate an aircraft or to carry passengers. Nor does it prescribe safety related qualities or skills as a condition of operating an aircraft. The prohibition, unique to commercial aviation, is linked solely to age and employment. The assertion that the Age 60 Rule does not conflict with the congressional prohibition on age discrimination is sophistry.

It is significant that the Equal Employment Opportunity Commission disputes the FAA's view that the court of appeals' decision "does not conflict with the EEOC's BFOQ regulation." Opp. at 11. In a letter to the FAA in the Age 60 Rule docket proceedings the EEOC chairman urged the FAA "to lift the age 60 limit for commercial pilots" because "The EEOC does not believe that a chronological age limitation for commercial pilots is a BFOQ." R. 379. The EEOC's interpretation of the statute it administers should have been given deference by the court below. "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). But the court of appeals here made no reference to the EEOC's

stated position or its regulations in the court's determination that the Age 60 Rule did not infringe on the ADEA. *See* Pet. App. at a-6 - a-9.

The FAA argues that "When Congress intends that civil rights legislation apply to federal agencies in their programmatic activities, it so provides in unmistakable language." Opp. at 10. The Age 60 Rule, unlike the grants programs subject to the FAA's example, 29 U.S.C. §794(a), is a regulatory, not a programmatic activity. Moreover, the ADEA itself reflects Congress's policy of exempting governmental rules from the scope of civil rights legislation when that is its intent. The ADEA contains an explicit exception for employers in foreign countries whose hiring practices would cause the employer "to violate the laws of the country in which the workplace is located." 29 U.S.C. §623(f)(1). The absence of a comparable exception for federal agency regulations, indicates that Congress did not intend to create one.

On similar premises, the FAA seeks to explain the court of appeals' total disregard of this Court's decision in *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985). The FAA acknowledges that *Criswell* "endorsed the EEOC's regulation, ruling that an employer has the burden of proving that an age limit is a BFOQ," Opp. at 12, but then asserts that *Criswell* is not applicable because "the court of appeals here did not address whether the Age 60 Rule is a BFOQ." Opp. at 13.

The FAA's conclusion begs the question. Although *Criswell* did not involve a direct challenge to the Age 60 Rule, the Court nowhere intimated that the requirement that an employer prove that age is a BFOQ was subject to an exception for safety regulations by federal agencies. On the contrary, the Court noted that the two part inquiry encompassed in the EEOC regulations "'adjusts to the safety factor' by ensuring that the

employer's restrictive job qualifications are 'reasonably necessary' to further the overriding interest in public safety." 472 U.S. at 413 (quoting *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (1976). Moreover, it noted that the probative value of the Age 60 Rule as a BFOQ for flight engineers not only depended on the similarities between the positions but also on "the weight of evidence supporting its safety rationale." 472 U.S. at 418. Thus, the decision implied that the safety rationale of the Age 60 Rule itself is subject to scrutiny under the BFOQ standard.

Contrary to the FAA's assertion, Opp. at 14, the Sixth Circuit's decision in *Coupé v. Federal Express Corp.*, 121 F.3d 1022 (6th Cir. 1997), *cert. denied*, No. 97-1012 (March 23, 1998), also is patently in conflict with *Criswell*. *Criswell* held that BFOQ determinations were factual issues to be submitted to a jury. 472 U.S. at 422. *Coupé* held that the Age 60 Rule constituted a BFOQ as a matter of law, affirming the trial court's grant of a 12(b)(6) motion without affording the plaintiff an opportunity to challenge the scientific basis for the Rule or to show why cargo pilots, who do not carry any passengers, should not be subject to it. 121 F.3d at 1024. Moreover, the court in *Coupé* expressly declined to rule on the "correctness" of the Age 60 Rule, deferring on that issue to the decision of the D.C. Circuit here on appeal . *Id.* at 1026 & n. 2. Therefore, the Sixth Circuit's decision in *Coupé* only compounds the injustice of the decision of the court below and renders the need for review by this Court even more compelling.

II
THE COURT OF APPEALS WAS OBLIGATED TO APPLY AN EXACTING STANDARD OF REVIEW TO THE FAA'S ANALYSIS OF THE ADEA.

Notwithstanding the EEOC's objection that the Age 60 Rule violated the ADEA, the court below reviewed the FAA's decision under an "arbitrary and capricious" standard. 5 U.S.C. §706(2)(A), Pet. App. at a-9, a-10. In the Petition for Certiorari we showed that the FAA was required to consider and to accommodate the EEOC policies in its determinations, consistent with the APA's requirement that agency powers not be exercised "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. §706(2)(C). Pet. at 19 - 22. The FAA responds that petitioners' authorities are "inapposite," because "the Age 60 Rule does not conflict with the ADEA or with the EEOC's regulations and jurisdiction." Opp. at 14.

The FAA's argument can only stand if we assume, as the court of appeals did, that the FAA has no obligation to try to avoid a conflict with the countervailing policy of its sister agency. If, as the EEOC maintains and as the dissent urged, the FAA was obligated to give consideration to age discrimination policy, it is clear that the FAA made no attempt to derive the "precisely and narrowly drawn" remedy required under *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 173-74 (1962).[1]

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[1] The FAA contends that the fault of the agency decision in *Burlington Truck Lines* was that the agency made "no findings and no analysis." Opp. at 15, quoting 371 U.S. at 167. The remark is taken out of context. The ICC Commissioner made extensive findings in *Burlington*. *Id* at 161-63. Where the agency departed from the APA was in its failure to make specific findings that addressed the conflict between its jurisdiction and that of the National Labor Relations Board and to be "particularly careful in its choice of remedy...because of the possible effects of its decision on the functioning of the national labor

The FAA's failure to attempt to accommodate the EEOC and to seek a "narrowly drawn" remedy is evident in the agency's persistent disregard of the conclusions of its own experts. The NIH recommended retaining the Age 60 Rule only long enough for the FAA "to collect the medical and performance data necessary to consider relaxing the age 60 rule." Pet. App. at 44. Moreover, the director of the National Institute on Aging, which prepared the NIH report, later declared under oath that the NIH had "formally abandoned" its endorsement of the Age 60 Rule and "that it was the official position of the NIA that testing of pilots after age 60 was feasible and desirable." R. 636; *See* Pet. App. at a-22, a-29-30, n. 4.[2] The Hilton Report, commissioned by the FAA to study the accident data that was necessary to discharge the agency's statutory mandate to regulate "in a way that best tends to reduce or eliminate the possibility or recurrence of accidents," 49 U.S.C. §44701(c), concluded that the accident rate for older pilots seemed to decline. Pet. App. at a-33, a-57; R. 131. Yet the FAA, in disregard of the recommendations of the NIH and the Hilton Report, refused to grant carefully screened waivers to the Age 60 Rule or otherwise try to obtain the data that

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relations policy." *Id.* at 172. Similarly, detailed findings concerning the conflict between the Age 60 Rule and the ADEA and a careful weighing of the available choices in light of the ADEA policies are absent here.

[2]Although the panel majority below questioned whether the views of the director, Dr. T. Franklin Williams, reflected those of his agency, Pet. App. at a-22, his submissions to Congress are consistent with his expressed views. Dr. Williams submitted a letter to the committee chairman of the House Select Committee on Aging in his capacity as director of the NIA, asserting that further medical research had "documented the predictive value of certain tests," and transmitting an extensive testing protocol developed by Dr. Williams and two of his NIH colleagues. *Age Discrimination and the FAA Age 60 Rule: Hearings before the House Select Comm. on Aging*, 99th Cong., 1st Sess. at 59 (1985).

would permit it to avoid arbitrary age discrimination.[3] *See* Pet. App. at a-34 - a-37 (Wald, J., in dissent discussing the FAA's "refusal to obtain" evidence on older pilot safety).

It is a matter of semantics whether the court below was required to apply a "heightened standard of review," Pet. at 20, or merely required to ensure that the FAA's decision was "in accordance with law," 5 U.S.C. § 706(2)(A) and not "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C §706(2)(C). Under either description the FAA's decision to ignore the expressed objections of the EEOC required a more searching examination than the FAA's disposition afforded. As Justice White noted in *Burlington Truck Lines*, the expertise of federal agencies, if unrestrained, "can become a monster which rules with no practical limits on its discretion." 371 U.S. at 167, quoting *New York v. United States*, 342 U.S. 882, 884 (1951)(Douglas, J. dissenting).

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[3] The FAA cites *Advocates for Highway and Auto Safety v. Federal Highway Admin.*, 28 F.3d 1288 (D.C. Cir. 1994) as requiring that any waiver of a safety standard be factually justified. Significantly, that decision did not prevent the agency there from implementing the rule it proposed. Following remand, the FHWA analyzed studies of accident data, determined that the past record of the drivers was a "reliable predictor of continued safe performance," and implemented the rule. 59 Fed. Reg. 50,887, 50,890 (1994). There is no reason why the NIH's recommendation and the declining accident rate for older pilots identified in the Hilton report should not have provided a similar foundation for an increase in the age limit or for waivers of the Age 60 Rule in the present case.

III
THE CONFLICT IN THE CIRCUITS CONCERNS FUNDAMENTAL ISSUES OF ADMINISTRATIVE LAW THAT MERIT THE ATTENTION OF THIS COURT.

An additional basis that petitioners urged for review by this Court was the conflict in reasoning and outcome between the decision of the court below and that of the Sixth Circuit in *Coupé*, the Seventh Circuit in *Aman v. FAA*, 856 F.2d 946 (7th Cir. 1988) and *Baker v. FAA*, 917 F.2d 318 (7th Cir. 1990), *cert. denied*, 499 U.S. 936 (1991), and the Ninth Circuit in *EEOC v. Boeing Corp*, 843 F.2d 1213 (9th Cir.), *cert. denied*, 488 U.S. 889 (1988). The FAA perceives no conflicts, because the outcome of the *Coupé* case is consistent with that of the court below, Opp. at 17, the *Boeing* case involved flight engineers who were not directly subject to the Age 60 Rule, Opp. at 17, and the *Aman* and *Baker* cases did not invalidate the Rule, notwithstanding the Seventh Circuit's harsh criticism of it, Opp. at 19.

The FAA's view is unreasonably narrow. This Court's consideration of certiorari in cases involving conflicts in the courts of appeals is not restricted to conflicts acknowledged by the lower courts or cases with opposite outcomes. *See, e.g., University of Pennsylvania v. EEOC*, 493 U.S. 182, 188 (1991) (certiorari granted "Because of what might be thought of as a conflict in approach ... and because of the importance of the issue"). The four courts of appeal that have addressed the legitimacy of the Age 60 Rule within the last ten years have come to widely divergent conclusions concerning the Rule's scope and validity. In three of the four courts the soundness of the rule was questioned by the majority or the dissent. *See*, dissent below, Pet. App. at a-38-39; *Baker*, 917 F.2d at 322, 327; *Boeing*, 843 F.2d at 1220.

An important issue is at stake here that directly affects the civil rights of older Americans and indirectly affects everyone who is subject to regulation by a government agency. This Court should intervene to provide needed guidance.

CONCLUSION

As set forth in the Petition for Certiorari, this Court should grant the petition for certiorari to resolve conflicts in the courts of appeals and to define the limits of federal agency discretion.

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v.

FEDERAL AVIATION ADMINISTRATION,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICUS CURIAE* SOUTHWEST AIRLINES PILOTS' ASSOCIATION, THE ORGANIZATION OF BLACK AIRLINE PILOTS, INC. AND AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

The court below held that a Federal Aviation Administration regulation that requires scheduled airline pilots to cease work at age 60 was a reasonable exercise of agency discretion. In so ruling, the court held that the FAA was not bound by the requirement of the Age Discrimination in Employment Act (ADEA) that any age-based prohibition on employment meet the requirements for a bona fide occupational qualification (BFOQ). The Equal Employment Opportunity Commission, the agency that administers the ADEA, has consistently taken the position that the Age 60 Rule is not a BFOQ. The questions presented are:

(1) Whether the Federal Aviation Administration's general power to regulate air commerce and safety implies the power to relieve airline employers of their specific statutory obligation to avoid age-based discharge under the ADEA.

(2) Whether a federal agency regulation that contravenes the policy of another federal agency acting within the scope of its governing statute should be subject to a more exacting standard of review than a regulation that does not infringe on conflicting governmental policies.

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No. 97-1267

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

PROFESSIONAL PILOTS FEDERATION, WILLIAM T. REINERS, III, PHILLIP T. SHAW,

Petitioners

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

BRIEF OF *AMICUS CURIAE* SOUTHWEST AIRLINES PILOTS' ASSOCIATION, THE ORGANIZATION OF BLACK AIRLINE PILOTS, INC. AND AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Southwest Airlines Pilots' Association (SWAPA), The Organization of Black Airline Pilots, Inc. (OBAP) and the American Association of Retired Persons (AARP)[1]

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[1] Counsel of record wholly authored this brief. No persons or entities than *amicus curiae* have made a monetary contribution to its preparation or submission.

respectfully request the Court to grant the petition for writ of certiorari of the Professional Pilots Federation, William T. Reiners, III, and Phillip T. Shaw in this case.

CONSENTS GRANTED

Petitioners and respondent have given their respective consents to *amicus curiae* SWAPA, OBAP and AARP filing a brief in support of the petition for certiorari.

STATEMENT OF INTEREST OF *AMICUS CURIAE* SOUTHWEST AIRLINES PILOTS' ASSOCIATION

SWAPA is an association of 2,542 professional pilots employed by Southwest Airlines Company. As pilots working for an air carrier subject to Part 121 of the Federal Aviation Regulations, 14 C.F.R., Part 121, SWAPA's members are subject to the Federal Aviation Administration's "Age 60 Rule," 14 C.F.R. §121.383(c). The Rule requires SWAPA's members to retire from scheduled passenger service once they reach Age 60. Once they are forced into retirement, few members can find comparable employment as pilots in operations not subject to Part 121 (e.g., corporate aircraft or non-U.S. airlines).

Although retirement at age 60 may suit the economic interest of pilots who fly for a few of the major airlines where the pension plans and seniority are structured around the Age 60 Rule,[2] it adversely affects pilots in independent

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[2] The two largest airline pilot unions, the Air Line Pilots Association (ALPA) and the Allied Pilots Association (APA) opposed below any change to the Age 60 Rule. See Comments of APA, Age 60 Docket (FAA Docket No. 27264) (R. 292 (reference to the record in the joint appendix on appeal below)); Comments of ALPA, Age 60 Docket (R. 341); *Amicus Curiae* Brief of APA in the court of appeals; Notice of

airlines such as Southwest. Southwest has experienced enormous growth in the 27 years since it was founded in 1971. The majority of SWAPA's current membership have come on board within the last ten years. Many are older pilots who previously worked for other airlines, including ones that went bankrupt in the shakeout that followed deregulation. As a consequence, they do not have the security of a defined benefit pension plan structured around an age 60 retirement, as do pilots at the larger carriers. Instead, they must rely on the Southwest Airlines Pilots' Association 401(k) Plan and the Southwest Airlines Company Profit Sharing Plan, which are defined contribution plans.

Hence, Southwest Airlines pilots are required to fund a significantly higher percentage of their retirements than pilots at larger carriers. Thus, the right to work free of age discrimination, guaranteed by the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA) (1988), is especially important not only to SWAPA's members, but

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Amicus Curiae ALPA in the court of appeals. A large number of ALPA's and APA's membership are pilots who work for older, larger carriers where growth is slow, and, consequently, pilots can take a long time to advance from the entry level position of flight engineer to full captain. See, e.g., testimony of Capt. Tom Corboy, American Airlines (R. 448). SWAPA believes that these unions do not speak for pilots as a group but only for a vocal contingent of their respective memberships. In any event, their policies are driven by economic concerns. In testimony below before the FAA, APA's spokesman, Richard Lavoy acknowledges APA's belief that abolition of the Rule would "negatively impact promotions and compensation" (R. 404) and cause "hundreds of furloughs" as a result of the industry's alleged "current shrinkage and no-growth period" (R. 405). ALPA in its Comments to the FAA acknowledged that "Each ALPA collective agreement is based on the presumption of mandatory retirement at age 60," and that "salary and career progressions were established with the assumption that pilots would retire at age 60 and create opportunities for more junior pilots." (R. 359).

to a large cadre of other pilots who work for the younger, more progressive airlines.

SWAPA's interest in the safety of airline passengers and Southwest Airlines' safety record stand second to none. Southwest Airlines and its pilots place the safety of their passengers first. They don't want their passengers to fly on aircraft flown by unsafe pilots. SWAPA's members "ride" to their jobs on aircraft almost as often as they pilot aircraft. They don't want to ride on aircraft flown by unsafe pilots, and they don't want to co-pilot an aircraft with an unsafe pilot.

STATEMENT OF INTEREST OF THE ORGANIZATION OF BLACK AIRLINE PILOTS, INC.

OBAP is a non-profit corporation organized under the laws of the District of Columbia. Its purpose is to enhance, advance, and promote educational opportunities in aviation; to develop and sustain a process for the ongoing mentoring of youth; to monitor the development of aviation projects; and to protect the general interest of its members.

OBAP extends full membership to active, formerly active or retired cockpit crew members of any commercial air carrier and to any Federal Aviation Administration flight crew inspector. OBAP extends associate membership to those persons who are interested in the aviation industry and are not eligible for full membership. Presently, OBAP has 325 active full members and 1140 active associate members. Many of OBAP's full members are working or have worked for air carriers subject to Part 121 of the Federal Air Regulations and thus are or have been subject to the Age 60 Rule.

OBAP's interest in this case is two-fold: (1) it opposes the Age 60 Rule as unfairly and unlawfully discriminatory; and (2) it believes that if a federal agency is able to establish and continue a rule or practice that discriminates in contradiction of federal non-discrimination laws respecting age, similar unfair and unlawful practices may arise or expand to discrimination on the basis of race, gender, ethnicity or national origin.

STATEMENT OF INTEREST OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS

AARP is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. AARP seeks through education, advocacy, and service to enhance the quality of life for all by promoting independence, dignity, and purpose in work and retirement.

More than one third of AARP's thirty-two million members are employed individuals, most of whom are protected by the ADEA, and state anti-discrimination laws. One of AARP's primary objectives is to achieve dignity and equality in the work place through positive attitudes, practices and policies regarding work and retirement. Through its research, publications, and training programs, AARP seeks to eliminate ageist stereotypes, to encourage employers to hire and retain older workers, and to help older workers overcome the obstacles they face because of age.

AARP's concern in this case is that, based solely on age, the FAA Age 60 Rule mandatorily retires pilots who are otherwise physically and mentally fit and qualified to be productive members of the work force, with little or no

evidence that their reaching age 60 has any impact on airline safety. AARP has consistently opposed this rule because it is inconsistent with the purposes of the ADEA and contrary to public policy.

REASONS FOR GRANTING THE WRIT

The issues Petitioners present are of the highest importance. Congress with the ADEA has expressed the will of the electorate in enacting legislation barring discrimination based on age "with respect to [an individual's] compensation, terms, conditions, or privileges of employment" (29 U.S.C. §623(a)(1)), except where "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business" (29 U.S.C.§623(f)(1)). Yet the FAA's Rule arbitrarily banishes U.S. commercial airline pilots from the captain and first officer seats the moment they turn 60.

As hinted at by the dissent below, what might not be arbitrary and capricious without the ADEA, may be with it. The Age 60 Rule was arbitrarily conceived and, having been politically nurtured for 38 years, has attained the veneer of venerability. Yet SWAPA believes the Rule survives because of political and economic, not safety considerations.[3] The

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[3]The Petition for Certiorari has detailed the history of the Rule and the decision below, but the role of ALPA and APA in influencing the FAA's decision to hold on to the Age 60 Rule deserves more explanation. The FAA's decision to reject the Hilton Report's recommendation to raise the age limit for Part 121 operations was largely based on the agency's acceptance of the criticism of the report voiced by David Michaels, a researcher whose study of accident data was subsidized by ALPA and APA (R. 73-74). Other arguments proffered by ALPA and APA, and adopted by the FAA, include the following: (1) the contention that "Medical science cannot accurately measure age-related deterioration in vitally important cognitive functions" (APA Comments, R. 296; cf.

dissent in the court of appeals aptly demonstrates why the Court should look below the veneer; such a look would reveal that the FAA has perpetuated the Age 60 Rule unjustly.

The Age 60 Rule is a government agency-erected monument to age discrimination.[4] As an affront to the spirit if not the letter of the ADEA, it should be given great scrutiny. While the Federal Aviation Act and the ADEA are silent as to each other, the FAA has been accorded extraordinary statutory power to be the arbiter of aviation safety, while at the same time it controls (and has precluded) the means to determine whether there is an appropriate basis for this arbitrary Rule. We refer to the fact that the FAA has refused to evaluate pilots over the age of 60, including refusing to grant any exemptions to allow even a select group of pilots to fly commercial aircraft beyond age 60. Pet. App. A at a-68-69. The premise of the Rule thus continues unevaluated.

With power comes responsibility. Petitioners speak of the FAA's decision as "power unrestrained" (Pet. at 22).

ALPA Comments, R. 356); (2) emphasis on the recommendations of the 1981 NIH Report as a basis for rejecting the recommendations of the 1993 Hilton Report (APA Comments, R. 298; ALPA Comments, R. 353); (3) the contention that simulator testing is inadequate to screen pilots over the age of 60 (APA Comments, R. 308; ALPA Comments, R. 357). By adopting the arguments espoused by ALPA and APA, the FAA abdicated its role as a disinterested decision maker acting in the public interest.

[4] As the dissent below cogently stated, "the Age 60 Rule stands as an instance of government-mandated age discrimination for a particular group of employees." Pet. App. A at a-38.

We see it as power abdicated.[5] Rather than monitoring too closely, it has abdicated monitoring individual fitness to fly in favor of an arbitrary age-based rule.[6] The FAA has failed to ameliorate the Rule in 38 years, despite the ADEA, and despite 38 years of revolutionary advances in medicine, science and technology,[7] all the while doing precious little seriously to consider whether it should be changed.

We believe the record amply demonstrates that the FAA has found it easier and more comfortable to do nothing about the Age 60 Rule. To change the Rule would require action by the FAA. For example, individualized health and performance screening of pilots would probably require norming and standardizing of cognitive tests and simulator

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[5] While noting that "it is difficult to imagine an agency decision which judges would be more disposed to accept than one that implicates aviation safety," the dissent below stated that "deference to agency expertise cannot be allowed to become toleration of arbitrary agency action—or in this case inaction—even in an area as critical as aviation safety." Pet. App. A at a-39.

[6] Even law enforcement officers routinely administer simple tests to suspected drunken drivers to determine cognitive and performance ability, yet the FAA eschews individualized health and performance monitoring of pilots of airplanes each carrying hundreds of people thousands of feet above the ground at speeds in excess of 500 miles per hour, in favor of an age-based Rule.

[7] In 1959, when the Age 60 Rule was enacted, jet aircraft were just being introduced to U.S. airline fleets, *see, e.g.*, Letter of April 30, 1959 of C.R. Smith, President, American Airlines to General Elwood Quesada, FAA Administrator (R. 626-27), and the computer chip was unheard of. Today, any consumer with a computer can purchase *Microsoft Flight Simulator* 98 software for $49.95 and experience a more detailed and realistic impression of actual flying than existed until the 1980's on the most sophisticated commercial aircraft flight simulators. *See, e.g.*, http://srch.outpost.com. In the same period, the FAA has seen fit to do nothing with the Age 60 Rule.

performance checks. Perhaps individualized determinations would result in more administrative and even legal challenges than are now the case under an arbitrary age cut-off of 60.

Who could blame the FAA for not wanting to enter that thicket—except that the FAA is statutorily charged to monitor the safety of aviation and given the exclusive responsibility to do so.[8] Inaction might be justified were not the means at hand to plumb medical condition, assess cognitive ability, and test performance and endurance in the real-time, realistic conditions of the flight simulator. Most important, individualized screening would make for a fairer and a safer scheme and one that did not conflict with the congressional mandate barring age discrimination.

Petitioner advocates a higher standard of review than "arbitrary and capricious" of the FAA's refusal to change the Rule, because the FAA's Rule infringes on congressional civil rights policy as manifested in the ADEA, EEOC regulations and *Western Air Lines, Inc. v. Criswell,* 472 U.S. 400 (1985) (Pet. at 22). SWAPA believes there is an additional important reason for greater scrutiny of the FAA's decision.

As the expert arbiter of air safety, the FAA also controls the means to evaluate whether safety is affected by a pilot's age. In its refusal even to study pilots over age 60,

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[8] While the National Safety Transportation Board is charged with safety investigation of civil aviation accidents, its charter is to act with regard to specific accidents. 49 U.S.C. §1131(a)(1). Its charter can be said to be reactive, even though lessons learned from accidents often find their way into Safety Recommendations to which the Secretary of Transportation must respond. 49 U.S.C. §1135(a). On the other hand, the FAA's statutory charge is to "*promote* safe flight of civil aircraft . . . ." [emphasis added] 49 U.S.C. §44701(a). The FAA's 38 years' inaction on the Age 60 Rule raises the question whether the FAA has carried out its statutory mandate to *promote* safe flight.

the FAA has abused its power by blocking any change in the Rule and simultaneously precluding investigation of whether abolition or modification of the Rule is appropriate. Given the congressional condemnation of age discrimination embodied in the ADEA and the dual nature of the FAA's role, the FAA's actions should be subjected to a higher degree of judicial scrutiny than the deferential "arbitrary and capricious" standard applied by the court below.

CONCLUSION

We are not asking this Court to decide how long commercial pilots should fly or how medical examination and testing should occur. But we think the record contains more than enough evidence that the FAA is simply too content to maintain the *status quo*, even after 38 years, and will not act without judicial intervention.

We do not necessarily advocate that the Court should strike down the Age 60 Rule as violative of the ADEA. What we do advocate is that the FAA on this record should be subject to a higher standard of review where its Age 60 Rule violates at least the spirit of the ADEA; where there is clear evidence that the means of assessing health, cognitive testing and simulator development have radically advanced since 1959; and where in 38 years the FAA has done too little even to consider whether a change is merited.

Respectfully submitted,

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